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Supreme Court, U.S.
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No. 89-___

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

Petitioner,

vs.

CHARLES I. FAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Amendment, as it applies to death penalty cases, is violated by a requirement that the sentencing judge weigh all mitigating evidence against each statutory aggravating factor separately.

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OPINION BELOW

In conformity with its opinion in *State v. Charboneau*, Nos. 16339 and 16741, April 4, 1989, *Reh.Denied*, May 25, 1989, App. 107 et seq., the Idaho Supreme Court held that Fain's death sentence would be vacated because "it appears that the trial court incorrectly weighed all of the mitigating circumstances against all of the aggravating circumstances, collectively, rather than individually as required by Charboneau." App. 40.

The opinion has not yet been published and is included in Petitioner's Appendix, together with the opinion in *State v. Charboneau, supra*. A petition for certiorari is being sought separately with respect to Charboneau.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides in part:

> " . . . nor cruel and unusual punishment inflicted."

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

STATEMENT OF THE CASE

Charles I. Fain was convicted of murder in the first degree, lewd and lascivious conduct with a minor under the age of sixteen (16), and first degree kidnapping. The victim of the offense was a nine year old child, Daralyn Johnson.

The child was kidnapped from the neighborhood of her home in Nampa, Idaho, as she was walking to school. Her body was found three days later lying face-down in a shallow stream. An autopsy revealed that the child had been sexually molested and had died from drowning, although at the time of her death, she may have been unconscious from a blunt blow to the left forehead.

Subsequent to Fain's conviction, the trial court conducted a sentencing hearing to receive aggravating and mitigating evidence. The trial court found that two statutory aggravating factors defined by Idaho Code § 19-2515 had been established and that the mitigating factors present in the case did not outweigh the gravity of the aggravating factors. *See,* App. 36.

A number of issues were raised on Fain's direct and collateral appeals. As far as is pertinent here, the Idaho Supreme Court vacated the death sentence imposed on Fain, giving the following reasons:

> It appears that the trial court incorrectly weighed all of the mitigating circumstances against all of the aggravating circumstances, collectively, rather than individually as required by Charboneau [*v. State,* (1989) Slip. Op. No. 144 April 4, 1989, App. 107, et seq.] For this reason, we vacate the sentence and remand for resentencing in accordance with our decision here and in *Charboneau. Fain,* App. 40.

Initially, the Idaho Supreme Court held that the two aggravating circumstances found "overlapped," that is, they were essentially the same and thus should not have been counted as two. After the State sought rehearing on this point, the court abandoned the theory and adopted the view that is the subject of this petition.

MANNER IN WHICH THE FEDERAL QUESTION PRESENTED WAS RAISED

The closest the Appellant came to raising the issue decided by the Idaho Supreme Court was summarized in his appeal brief as follows:

> The trial judge, by interpreting the death penalty as being mandatory in nature, by ignoring or disregarding mitigating evidence, by disproportionately applying the death penalty because of his belief now that the statute is mandatory, and by imposing the death penalty in this case, deprived the defendant of his most precious constitutional rights under the Eighth and Fourteen Amendments to the United States Constitution. Appellant's Br., p. 11, App. 106b.

In connection with this argument, Fain asserted that the "shall impose" language of Idaho Code § 19-2515(c) created a mandatory death sentencing scheme that did not allow for individualized consideration of the defendant's culpability, in violation of this Court's holdings in *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976). Fain contended that the trial judge had exercised no discretion in the imposition of sentence but, instead, applied a presumption that the death penalty was mandatory unless the defendant could show that mitigating factors outweighed aggravating factors. The Idaho Supreme Court's holding appears to have been triggered by this argument. Initially, the Idaho Supreme Court held that the balancing of aggravating and mitigating circumstances had been impermissibly affected by what was asserted to be the duplicative nature of the two aggravating circumstances found. The State petitioned for rehearing on this point, following which the court issued a new opinion retreating from its objection to "duplicative" aggravating circumstances and relying instead on the view that the court had improperly weighed aggravating and mitigating evidence because it did not weigh all mitigation against each aggravating factor separately.

The court rested its holding wholly on its decision in *State v. Charboneau, supra,* for which reason we review briefly the manner in which *Charboneau* raised this question as a federal question and the Idaho Supreme Court's response to it.

Charboneau asserted in his brief on appeal that at least one of the statutory aggravating circumstances relied upon by the sentencing court was constitutionally invalid, as a consequence of which *Zant v. Stephens* 462 U.S. 862 (1983) required that the death sentence be vacated. The theory was that *Stephens* recognized that under some statutes there is a requirement for "weighing" aggravation against mitigation and in such cases the failure on appeal of one of multiple aggravating circumstances upsets the balance, making it necessary to vacate the sentence.

In a supplemental brief, filed in response to the decision of the Ninth Circuit Court of Appeals in *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988), Charboneau asserted that the Idaho statute required the court to weigh all of the mitigating circumstances against each aggravating factor independently. This theory was extracted from statutory language which reads "where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." Idaho Code § 19-2515(c). Charboneau contended that the sentencing court had not obeyed this requirement and had thus violated "his rights to due process guaranteed

under the Fourteenth Amendment to the Federal Constitution and Article 1, § 13 of the Idaho State Constitution." Charboneau also cited several state cases, as well as *Williams v. People,* (sic) 337 U.S. 241 (1949), and *Gardner v. Florida,* 430 U.S. 349 (1977), in support of his argument.

The Idaho court's response to the argument was to hold that "all the mitigating circumstances presented must be weighed against each of the aggravating circumstances separately." The constitutional issues were not mentioned.

In its petition for rehearing, the state asserted that "resorting to a sentencing system involving statutory aggravating factors is an incident of federal constitutional law," citing *Gregg v. Georgia,* 428 U.S. 153 (1976) and *Godfrey v. Georgia,* 466 U.S. 420 (1980). The state argued that the courts formulation of weighing requirements was impossible to apply in a principled way and it thus created an element of arbitrariness in the weighing process. The petition was denied without opinion.

Although the Idaho Court stated that "the plain meaning of the statute dictates our conclusion on this issue" (Charboneau, App. 159), the state asserts herein that this court has jurisdiction to review the holding because the Idaho Supreme Court has based its construction of the state's death penalty statutes on federal constitutional law and because the court evaded a federal constitutional issue.

REASONS FOR GRANTING THE WRIT

I

THIS COURT HAS JURISDICTION TO REVIEW THE ISSUES PRESENTED

The Idaho Supreme Court has held that the state's death penalty statutes were enacted in response to this Court's objections to the kind of mandatory statute the state had in force prior to 1976 and that "[t]o meet this mandate the Idaho legislature enacted an amended version of Idaho Code § 19-2515 [the statute pertinent to this issue]." *State v. Osborn*, 631 P.2d 187, 191 (Idaho 1981).

The circumstances set out above demonstrate that the Idaho Supreme Court necessarily decided a federal question by its holding. *Street v. New York*, 394 U.S. 576 (1969) thereby conferring jurisdiction on this court. In addition, this Court held in *Michigan v. Long*, 463 U.S. 1032 (1983), that "when . . . a state court opinion fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so." 463 U.S. at 1040-1041. The Idaho court's decision not only contains no plain statement of reliance on an adequate and independent state ground, but the circumstance that it was responsive to federal claims and involved statutory construction interwoven with federal concerns, *Osborn, supra*, makes clear that this court has jurisdiction to review the holding. Cf. *Harris v. Reed*, 109 S.Ct. 1038, 1043 ("We held in [Michigan v.] Long that unless the state court clearly expressed its reliance on an adequate and

independent state law ground, this Court may address a federal issue considered by the state court."); *Caldwell v. Mississippi*, 427 U.S. 320 (1985).

Cf. *Beck v. Alabama*, 447 U.S. 625 (1980) (federal claims properly presented to state courts where litigant stated to state court that he was raising Eighth, Sixth and Fourteenth Amendment issues); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (jurisdiction over a federal question does not depend on citation to book and verse). See also *Johnson v. Mississippi*, 486 U.S. ___, 100 L.Ed.2d 575 (1988) (Inconsistent application deprives state ground of adequacy.)

Some difficulty is presented by the court's statement that "the plain meaning of the statute dictates our conclusion" and by its reference to the rule of strict construction of criminal statutes. (Appendix 159) The court's assertion must, however, be considered against the background of its holding in *Osborn, supra*, setting its construction of Idaho Code § 19-2515, the statute at issue, against this Court's constitutional mandate, and the circumstance that the holding was responsive, at least in part, to federal claims raised by both the defendant and the state. Either the court adopted its construction because it believed federal law required it, *Long, supra*, or it evaded a federal issue. In either case, this court has jurisdiction to review the holding. See *Wolfe v. North Carolina*, 364 U.S. 177 (1960). Moreover, the Idaho Court has adopted a construction of Idaho Code § 19-2515 that overtly violates the Eighth Amendment.

II

THE IDAHO SUPREME COURT'S HOLDING THAT ALL MITIGATING EVIDENCE MUST BE SEPARATELY WEIGHED AGAINST EACH INDIVIDUAL AGGRAVATING FACTOR IS INCONSISTENT WITH FEDERAL LAW

The decision of the Idaho Supreme Court is inconsistent with the precedent of this Court and conflicts with decisions of courts of other states. The holding limits the state's ability to avoid a capricious sentencing system.

This Court has held that a sentence of death that rests on one statutory aggravating factor need not be reversed even if additional factors are found to be invalid on appeal. *Zant v. Stephens*, 462 U.S. 862 (1983). The Idaho Supreme Court has previously held that once the sentencing threshold is crossed by the finding of a statutory aggravating factor "it is within the sentencer's discretion to balance aggravating and mitigating circumstances, not pursuant to any special standard." *State v. Sivak*, 674 P.2d 396 (1983), *cert. denied*, 468 U.S. 1220 (1984). *See, also, Zant v. Stephens, supra.*

Resort to a sentencing system involving the balancing of statutory aggravating factors against mitigation is an incident of federal constitutional law. *Gregg v. Georgia, supra, Godfrey v. Georgia, supra, Lockett v. Ohio*, 438 U.S. 586 (1978). The finding of statutory aggravating factors begins the inquiry into whether the death sentence shall be imposed. After that point, the court must have some discretion to apply factors of leniency, *Lockett, supra.* Within those strictures, a state has discretion to structure its system in its own way. *Cabana v. Bullock*, 474 U.S. 376 (1986).

The Idaho statute provides that "where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death injust." I.C. § 18-2515(c).

What is called for by the statute is a simple, commonsense judgment by the trial court, whether, given the presence of a statutory aggravating factor, there is nonetheless sufficient extenuation that the death sentence should not be imposed. In *People v. Melton*, 750 P.2d 741 (Cal. 1988), the Supreme Court of California referred to this process as one that was normative, not mechanical. Rather than accept this straight-forward approach, the Idaho Supreme Court has formulated a "weighing" process that is almost impossible to apply in any principled way. The sentencing authority is told that all of the mitigation must be weighed against each aggravating factor, as though it were possible to somehow assign objective weight to both mitigating and aggravating circumstances. The difficulty with this approach is that no one knows how much a particular mitigating circumstance weighs. Assume, for example, the trial court were to find that the murder was especially atrocious and cruel and was also committed during the course of a robbery. If the defendant were youthful and had only a non-violent criminal record, it would be necessary to weigh these mitigating factors separately against each aggravating factor. How is this to be done? Does the sentencing judge merely say: "I have weighed mitigating factors against each aggravating factor separately" and let it go at that? If that is the answer, this case was allowed to turn on a mere formalism. If, on the other hand, some particular weight is to be

ascribed to mitigating factors – something the statute does not attempt to do – the Idaho court has not told anyone how much weight is to be assigned to such factors, and there is no practical way to apply them in uniform fashion. In effect, the court has introduced an element of arbitrariness into the weighing process. *People v. Hernandez*, 763 P.2d 1289 (Cal. 1988) (it is the quality of the various factors that governs, not a "count and measure" formula.)

By its decision, the court has not only departed from what is required by federal law, it has impaired the state's ability to follow the requirements of federal law by needlessly confusing the sentencing process in a way that is almost sure to lead to erratic and inconsistent sentencing results.

CONCLUSION

The judgment of the Idaho Supreme Court impairs the state's ability to enforce its death penalty statutes in a principled manner. The Court should grant the petition for certiorari and reverse the Judgment of the Idaho Supreme Court.

Respectfully submitted,

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APPENDIX

1989 Opinion No. 45

IN THE SUPREME COURT OF THE STATE OF IDAHO
No. 15414

STATE OF IDAHO,
Plaintiff-Respondent,
v.
CHARLES I. FAIN,
Defendant-Appellant.

Boise, February 1988 Term
Filed: April 4, 1989
Frederick C. Lyon, Clerk

1988 Slip Op. # 95 of October 25, 1988, is hereby withdrawn and this opinion substituted therefore.

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, Honorable Jim R. Doolittle, District Judge.

Appeal from conviction of first degree murder, lewd and lascivious conduct with a minor under the age of sixteen and first degree kidnapping. *Conviction affirmed; remanded for re-sentencing.*

Van G. Bishop, Esq., Nampa, Idaho, attorney for the appellant.

Hon. Jim Jones, Attorney General and Lynn E. Thomas, Solicitor General, Boise, Idaho, attorneys for the respondent. Jim Jones argued.

ON DENIAL OF PETITIONERS FOR REHEARING

HUNTLEY, J.

This appeal has been protracted and no doubt agonizing to those directly involved. We have heard oral

argument on several occasions and have been presented with more than one troubling issue requiring resolution. The pertinent facts are these: Charles I. Fain was convicted of first degree murder, lewd and lascivious conduct with a minor and first degree kidnapping of nine-year-old Daralyn Johnson. He was sentenced to death. Fain's appeal first came before this Court in March of 1985, for automatic review pursuant to I.C. § 19-2827 and upon several claims of error regarding both the conduct of the trial and the imposition of the death sentence. In August of 1985, this Court ordered further briefing on the single issue of whether Fain was denied due process and a fair trial as a result of the state's failure to preserve certain swabs of bodily fluid taken from the victim. After hearing oral argument thereon in November 1985, this Court suspended Fain's appeal to enable a post-conviction proceeding to take place, and to raise and resolve certain factual issues regarding Fain's claim that potentially exculpatory evidence was destroyed by the State by its failure to preserve certain swabs of bodily fluid taken during the autopsy of the victim.

The trial court issued findings on remand in an order on petition for post-conviction relief in March 1987, finding that tests of Fain established conclusively that Fain was a Type A secretor. Therefore, the swabs might have been exculpating had they disclosed semen from other than a Type A secretor. On remand, the trial court also found that Dr. Droulard, a pathologist who performed an autopsy on the victim, inadvertently discarded the swabs while assisting in the preparation of a sex crime kit. Fain argues that his due process right to fair trial was impacted as a result of the State's failure to preserve

potentially exculpatory evidence. We respect that argument, particularly in view of the weighty evidence used to convict Fain and affirm the conviction. We discuss each of his assignments of error in turn.

I. *THE PRELIMINARY HEARING*

Fain Argues that the evidence adduced at the preliminary hearing was insufficient to permit the magistrate to bind him over for trial. He claims that while the State presented evidence to establish that a crime had been committed, it totally failed to introduce evidence linking him to the crime. At a preliminary hearing, the state must prove only that a crime was committed and that there is probable or sufficient cause to believe that the defendant committed it. I.C.R. 5.1(b). State v. Gibson, 106 Idaho 54, 675 P.2d 33 (1983). This test may be met by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate, and a reviewing court may not substitute its judgment for that of the magistrate as to the weight of the evidence. Rideout v. Superior Court, 432 P.2d 197 (Cal. 1967).

In reviewing the testimony adduced at the preliminary hearing, we conclude that there was competent evidence, including reasonable inferences therefrom, to show probable or sufficient cause that the crimes charged had been committed and that the defendant was guilty of their commission. First, an automobile matching the description of Fain's uniquely painted automobile was seen in the vicinity of the abduction prior to the victim's disappearance. It matched the description of the automobile in which the child was allegedly abducted. Also,

the child's abductor was described as having "long, brown hair and a beard," which description matched that of the defendant. John Michael Thompson, an acquaintance of Fain, testified that Fain had asked him, "What would you say if I told you I killed someone?" Thompson also testified that Fain had threatened him. The magistrate concluded that such a threat indicated a guilty state of mind. A sample of Fain's pubic hair was found to be similar to pubic hairs found in the victim's panties, and evidence was presented that Fain's shoe tread could have made a footprint found and photographed near where the victim's body was found. While none of the above factors standing alone would be sufficient to permit the magistrate to hold Fain to answer, the cumulative evidence supports the finding that there was probable cause sufficient to charge Fain with the crimes. Hence, the magistrate did not err in holding Fain to answer and the district court properly upheld the magistrate's ruling.

II. *ADMISSION OF CELLMATES' TESTIMONY*

Fain contends that the trial court erred in admitting the testimony of Bobby Roberson and Ricky Lee Chilton, two inmates who shared a cell with Fain. Fain's assignment of error is based on his contention that Roberson and Chilton had been placed in his cell by the State in order to elicit incriminating information from him. Clearly, admission of statements made by an imprisoned defendant who is represented by counsel would violate the sixth amendment if the statements are deliberately elicited by governmental agents. Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246; 84 S.Ct. 1199 (1964); United States v. Henry, 447 U.S. 264; 65 L.Ed.2d 115, 100

S.Ct. 2183 (1980); and, State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981). However, the sixth amendment does not forbid admission of an accused's statements to a jailhouse informant who, placed in close proximity to the accused, does not make any effort to stimulate conversations regarding the crime charged. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986).

In *Kuhlmann*, a jailhouse informant was placed in close proximity to the defendant and instructed to ask no questions but to listen for information regarding the crime with which defendant was charged. The informant listened and surreptitiously wrote notes detailing what defendant said. The Supreme Court held there was no sixth amendment violation, as "the defendant must demonstrate that the *police and their informant* took some action, beyond merely listening, that was designed *deliberately to elicit* incriminating remarks." *Kuhlmann*, 477 U.S. at 459, 106 S.Ct. at 2630. (Emphasis added.) *See also*, Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987).

Fain was in custody and under indictment at the time Roberson and Chilton were in his cell. He was also represented by counsel. However, at a mid-trial suppression hearing, Roberson and Chilton both testified that they were not informants collecting information for the State, that they were in no way induced by payment or other favorable treatment to elicit information for the State, and that they were not acting on any government instructions to obtain evidence. On the basis of that evidence, the trial court concluded that Roberson's and Chilton's testimony should not be suppressed in that neither man was an informant collecting information for the State. The trial court concluded that any incriminating statements which

Fain had made to his cellmates were not the result of any deliberate action by the government or its agents. The court's ruling on the suppression motion was clearly grounded in his belief of Roberson's and Chilton's accounts of the circumstances under which Fain spoke to them in his cell. Because of the trial judge's ruling denying the suppression motion, we may infer that he found Roberson's and Chilton's testimony at the suppression hearing credible. The determination of whether a witness is credible is one of fact, and in the context of a suppression hearing, is to be made by the trial court. Jones v. Superior Court, 483 P.2d 1241 (Cal. 1971).

Fain also contends that the trial court erred in refusing to require Bobby Roberson to take a psychiatric or a polygraph test. Fain claims that Roberson had a history of mental problems and that, since Fain's conviction was obtained almost entirely on the basis of circumstantial evidence, the issue of the admissibility of Roberson's testimony was not a minor matter but a major issue and had the trial court required Roberson to take a psychiatric or polygraph test, Fain would have attempted to introduce the results of the test in order to show that Roberson had a motivation, reason, tendency or predisposition to lie. There is no authority for such a procedure and we find no error in the trial court's denial of the request.

III. *TRANSCRIPT OF FAIN'S STATEMENT*

At trial, Officer Newton testified as to statements Fain made during a taped police interview. The trial court disallowed the introduction of the tapes and the 58 page

transcript thereof. The State did not introduce the transcript, but Officer Newton simply related his recollection of part of the conversation. Fain requested that the entire transcript be admitted into evidence; he did not limit his request to those portions of the transcript which explained, qualified or were relevant to that part of the conversation regarding which Newton testified. Such limited, relevant portions would have been admissible under the then existing Idaho evidentiary practice, which practice is now articulated in Idaho Rule of Evidence 106:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

While we note that the State did not introduce a writing, the rationale of the above rule would seem to apply where, as here, the State introduces evidence of an oral communication which has been reduced to writing, and other portions of that conversation, also reduced to writing, "ought in fairness to be considered contemporaneously with it." However, since Fain's counsel failed to tailor his request in any respect so as to move for the admission of only those other parts of his statement which might be relevant in the context of Officer Newton's testimony, the trial court committed no error in refusing to admit the full transcript of the taped interview or the tapes themselves.

IV. *FAIN'S POLYGRAPH TEST*

Fain further argues that the trial judge committed reversible error by not admitting evidence of the results

of Fain's polygraph test. Fain contends that with the exception of the testimony of the two cell mates, he was condemned by evidence which was wholly circumstantial. He argues that since he has consistently asserted his innocence, the critical issue for the jury was whether he or the two cell mates were telling the truth. Fain had taken a polygraph test prior to his arrest. We conclude that the trial court did not err in refusing to admit the test results.

As a general rule, results of polygraph examinations are inadmissible absent a stipulation by both parties. Hopkinson v. Shillinger, 645 F.Supp. 374 (D.Wyo. 1986) *reh'g den.* 648 F. Supp. 141; Wilkie v. State, 715 P.2d 1199 (Alaska Ct. App. 1986); State v. Sanford, 699 P.2d 506 (Kan. 1985); Fernandez v. Rodriguez, 761 F.2d 558 (10th Cir. 1985); State v. Montes, 667 P.2d 191 (Ariz. 1983); State v. Crispin, 671 P.2d 502 (Kan. 1983); Aguilar v. State, 639 P.2d 533 (Nev. 1982); State v. Brown, 669 P.2d 1190 (Or. Ct. App. 1983); State v. Rupe, 683 P.2d 571 (Wash. 1984). Where stipulated polygraph results may be admitted, the defendant's participation in the examination must be free and voluntary. The trial court has discretion to exclude evidence if it finds that an examiner was not qualified or that the conditions under which the test was administered were unfair. The opposing party must be permitted to cross-examine the examiner as to his or her expertise, the reliability of polygraph examinations, the accuracy of the apparatus used, and all other points reflecting on the accuracy of the polygraph both in general, and in the particular case. Also, the jury must be instructed that the examiner's testimony as to the results of the test is not conclusive, but is to be taken only as an expert opinion.

State v. Rebeterano, 681 P.2d 1265 (Utah 1984). In the instant case, the prosecution did not stipulate to the admission of Fain's polygraph exam.

Moreover, the courts of many other states have held that results of polygraph examinations are not admissible in a criminal trial, regardless of whether the polygraph testimony is exculpatory. U.S. v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985); U.S. v. Nelson, 606 F.Supp. 1378 (S.D.N.Y. 1985); U.S. v. Grandison, 780 F.2d 425 (4th Cir. 1985), *rev'd* on other grounds, 107 S.Ct. 1269 (1987); U.S. v. Brevard, 739 F.2d 180 (4th Cir. 1984); State v. Beachman, 616 P.2d 337 (Mont. 1980); State v. Antone, 615 P.2d 101 (Haw. 1980); Sheppard v. State, 670 P.2d 604 (Okla. Crim. App. 1983). Federal law is in accord. U.S. v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974); U.S. v. Jenkins, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 1544, 411 U.S. 920, 36 L.Ed.2d 313 (1973); U.S. v. Watts, 502 F.2d 726 (9th Cir. 1974); U.S. v. De Betham, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 2299. 412 U.S. 907, 36 L.Ed.2d 972 (1973); U.S. v. Gloria, 494 F.2d 477 (5th Cir. 1974), *cert. denied* 95 S.Ct. 306, 419 U.S. 995, 42 L.Ed.2d 267 (1974).

The foregoing authorities reflect the prevailing judicial view that the physiological and psychological bases for the polygraph examination have not been sufficiently established to assure the validity or reliability of test results. While scientific developments may one day refine the polygraph examination so that the results of the test may more frequently merit admission into evidence, we will not now overturn the trial court's exclusion of such results absent a stipulation by both parties.

Fain also objects to the trial court's decision to exclude evidence of a "psychological profile" prepared by the Federal Bureau of Investigation. The profile was nothing more than the Bureau's guess, after evaluating the facts then before it, as to the personality composite of the unidentified subject. A profile, of course, is not a physical scientific test conducted upon actual evidence using well-established scientific principles. Moreover, the profile simply would not have been relevant evidence as to the issue of the identity of the perpetrator of the crimes charged. We conclude that the trial court did not err in refusing to admit the "psychological profile."

V. *THE DESTROYED SWABS*

After the state had recovered the victim's body, Dr. Droulard, a pathologist, performed an autopsy. The autopsy was conducted with the assistance of Officer Victor Rodriguez, a deputy sheriff with the Canyon County Sheriff's Department. During the course of the autopsy, Dr. Droulard used swabs to obtain fluid samples from the victim's body. The swabs were obtained as part of a "sex crime kit." Prior to trial, defendant moved the court to compel the prosecution to produce the "sex crime kit." That motion read, in part:

> 1. Previously this court ordered the State to turn over certain evidence to the State Laboratory for independent inspection.
>
> 2. From the inspection performed by the laboratory, Criminalist Pam Server has determined the presence of spermatozoa on the anal smear produced by the State.
>
> 3. The State did not produce nor deliver to the lab the vagina, throat, nose and anal swabs which,

according to page 10 of Dr. Droulard's autopsy report, were "given to Deputy Sheriff Victor Rodriguez for submission to the forensic laboratory."

4. Criminalist Server has advised defense counsel that she is reasonably certain that by examining the swabs referred to above, and in particular the anal swab, she could determine the blood type of the offender of Daralyn Johnson.

5. It has been forensically established that blood grouping factors are secreted in physiologic fluids other than blood, and that one such fluid is semen. *See* 2 Wecht, *Forensic Sciences*, Section 25.09(d)(2)(i), pages 25-90: Criminalist Server will so testify.

6. If the swabs are produced and the blood type determined is found not to be the defendant's blood type, such evidence will scientifically exclude the defendant from the spermatozoa found, and will exculpate him.

7. It is therefore vital to the defense that the swab prepared by Dr. Droulard and delivered to the State be produced for scientific examination.

8. The defendant's counsel was advised of the scientific discovery of spermatozoa only on Tuesday, October 11, 1983.

Prior to trial, defense counsel argued the above motion, informing the trial court that the evidence was material because it "could either include the defendant as a possible suspect, *or specifically exclude him and be exculpatory evidence on his behalf.*" (Emphasis added). The prosecutor informed the trial court that he had difficulty complying with the defendant's request because he did not know where the swabs were. The trial court stated that if the swabs were available, then the defendant would be entitled to a reasonable opportunity to examine them. The prosecutor stated that he would produce the

swabs if he could find them. The discussion concluded with the trial court asking the prosecutor to follow up on the matter and if the prosecutor could locate the swabs, he was to produce them for examination by the defense.

Immediately prior to the time of trial, defense counsel argued a motion to dismiss the charges on grounds that the defendant would be denied due process of law and a fair trial because the State had been unable to produce the swabs which were the subject of the pretrial motion to compel discovery. In support of the motion, defense counsel argued that Dr. Droulard, the physician conducting the autopsy, had by affidavit avowed that he had turned the swabs over to Officer Rodriguez of the Sheriff's Department; that the FBI officials by affidavit and disposition had indicated that, although they had received the sex crime kit from Officer Rodriguez, they had never received the swabs; and that had the defendant had access to the swabs, it is possible that the blood type of the victim's assailant could have been determined, and that the results could have exculpated the defendant in that it could have eliminated him as the offender.

Defense counsel cited Idaho v. Leatherwood, 104 Idaho 100, 656 P.2d 760 (Idaho Ct. App. 1982) and Brady v. Maryland, 373 U.S. 83, 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963) for the proposition that the prosecution must disclose to an accused, upon request, evidence. material either to guilt or to punishment and that failure to do so violates the due process clause of the fourteenth amendment, *irrespective of the good faith or bad faith of the prosecution*. Defense counsel further cited State v. Ward, 98 Idaho 571, 569 P.2d 916 (1977), for the proposition that where the prosecution has a duty to disclose, that duty includes

the requirement that it use *earnest efforts* to preserve evidence for possible use by the defendant.

Responding to defendant's argument, the prosecutor presented the testimony of Pamela Server, a forensic chemist at the State Crime Laboratory in Boise. Ms. Server's testimony on direct examination tended to establish that semen samples could be scientifically tested and could be helpful in determining the identity of a criminal suspect, or more precisely, could possibly exclude or exonerate certain suspects.

The prosecutor stated that he had spoken by phone with Victor Rodriguez, the deputy sheriff to whom Dr. Droulard had referred in his autopsy report. The prosecutor represented that Rodriguez had told him "that the procedure at the hospital at the time the autopsy was conducted was to the effect that the physician who performed the autopsy collected all of the samples, put the samples in the sex crime kit, the sex crime kit was then sealed at the hospital. That sex crime kit was then, by Officer Rodriguez, tendered to the FBI lab in Washington, D.C."

The prosecutor further stated that he had spoken with Bill McInnis, an F.B.I. agent who informed the prosecutor that he had received the sex crime kit and had broken its seal and that there were no swabs in the kit.

The trial court denied defendant's motion to dismiss for two reasons: (1) it found that the State never had possession of the swabs; and (2) it determined that, at best, had the defendant had access to the swabs, any results of testing of the swabs would have produced evidence only as to the sexual molestation charges and

not as to the homicide charge, the homicide being the result of asphyxiation. This ruling was made over defense counsel's objection that many of the prosecutor's statements were hearsay and that Dr. Droulard's affidavit, submitted at the preliminary hearing, contradicted Officer Rodriguez's representation that Dr. Droulard had discarded the swabs.

During the course of trial, outside the presence of the jury, an FBI special agent examiner, Douglas W. Deedrick, testified that, at the time he examined the sex crime kit in question, there were no anal, vaginal or oral swabs contained in the kit.

At trial, the prosecution called Dr. Droulard to the stand. During cross-examination Dr. Droulard testified that he had taken swabs of the rectal, vaginal and oral areas of the victim's body, used some of them to make slides, and that he had turned some of the swabs over to a hospital technologist and that he had given the remainder of the swabs to Deputy Sheriff Victor Rodriguez for inclusion in the sex crime kit.

At trial, Officer Rodriguez testified that he had been present at the time Dr. Droulard had conducted the autopsy. He testified that he had had possession of the sex crime kit for the sole purpose of assisting Dr. Droulard in the doctor's examination of the victim's body for evidence. He also stated that he observed the doctor perform the vaginal, anal and oral swabbing. His testimony conflicted with Dr. Droulard's testimony in that he stated that Dr. Droulard had not given him the swabs for the sex crime kit, but had instead thrown the swabs in the garbage.

On remand ordered by this Court, the trial court found that if he had to choose, he was of the opinion that it was Dr. Droulard who had discarded the swabs.[1]

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[1] Attached hereto is an Appendix, page 1 of which is a photocopy of the cover of the Sex Crime Kit. The upper document on page 2 is a photocopy of outer envelope #2 in which genital swabbing should be placed, which is initialed by F.B.I. agents Douglas W. Deedrick and William B. McInnis, which suggests the results may have been completed and something put in the envelope.

The lower portion of page 2 to Appendix A is a photocopy of the inner envelope to envelope #2, which would supposedly contain the actual swabs. It also is initialed suggesting it may have contained something.

Envelope #2 contained specific written directions regarding creation and preservation of the genital swabs. It is most difficult to understand the testimony of Officer Rodriguez in light of these explicit instructions.

As already mentioned, Rodriguez testified that Droulard discarded the swabs. Droulard testified that he gave them to Rodriguez. If Officer Rodriguez's testimony is to make sense, it means that Rodriguez sealed and deposited an empty envelope into the kit.

The trial court's finding on remand that, if forced to choose, he would believe the testimony of Rodriguez would mean that at some point Rodriguez would be standing there with an empty envelope in his hand. One would think at that point there would be a conversation between the doctor and officer about the need to fill the empty envelope, but neither the doctor nor the officer testified as to any conversation taking place between them. Indeed, Rodriguez testified that it did not occur to him to question Dr. Droulard. We find this

(Continued on following page)

At the close of the State's case-in-chief, the defense counsel argued that the trial court should dismiss the case. He stated:

> Prior to the commencement of trial a motion was filed in regards to the destruction of evidence. Specifically the swabs taken at the time of the autopsy.
>
> Now that the testimony for the State is completed, it is compelling that the Court dismiss this case on that motion for dismissal.
>
> Structure of the motion for dismissal was that it's evidence, it's potential exculpatory evidence, and the prosecuting attorney, through presentation of evidence, and upon statements to the Court, advised the Court that the swabs were never taken, and never delivered to the police department.

(Continued from previous page)

entire state of events, as well as the conflicting testimony thereon, most peculiar.

A further, curious factor is that at some time someone with handwriting dissimilar to that of the two F.B.I. agents wrote on the outer envelope of "Step 2 Genital Swabbing":

"Oral, vaginal and anal smears part of evidence 8."

If that were written on the envelope at the time of the autopsy, it would suggest that a knowing decision was made to ignore preserving the swabs as required by Step 2 and using the Step 9 smear samples as a substitute. This possibility is, of course, directly contrary to the testimony of Rodriguez and does not square with the fact that envelope #2 was sealed and sent to the F.B.I. In fact, our suspicions are further aroused by the fact that envelope 2 was at one time sealed. When samples are neither taken nor preserved, sealed envelopes for the preservation of such evidence are not submitted. Here, no saliva samples were taken, so envelope 8 was neither sealed nor inserted into the completed Sex Crime Kit.

> Now that we have concluded the evidence, Dr. Droulard has specifically stated in his testimony here today, and reaffirmed his autopsy report and affidavit, which is before the Court, as well as his testimony in the preliminary hearing transcript; that he did take the swabs, and he did deposit those to Officer Rodriguez.
>
> Officer Rodriguez in his testimony as I recall indicated that he had given the swabs to the doctor, but that he never received the swabs back.
>
> The criminalist has testified that given the swabs, she may have been able to exclude the defendant as a contributor of the sperm by typing of the blood. The word "may have been able" is not destructive to this argument for had the evidence been preserved, the defendant would have been able to pursue an avenue of exculpation which have [sic] now been closed by him--by state action.
>
> This type of exculpatory evidence is even more critical now, because of the individuals of the jail, Roberson and Chilton. They have come down and they have testified that the defendant says he had intercourse with the girl. That he was only--that--that he was the only molester involved.
>
> Therefore, it now is critical from a life and death standpoint for the defendant when we cannot pursue that avenue for the jury because the State destroyed, lost, or failed to preserve, whatever, whatever term we use, the evidence which we can pursue.

. . . .

In attempting to refute the defendant's argument, the prosecution stated:

> [T]he evidence is not conclusive that the State ever did have possession of those swabs. There is inconsistent evidence.
>
> One witness, Dr. Droulard, stated that he did give the swabs to Detective Rodriguez. Detective Rodriguez,

> just as emphatically, emphasizes that he did not ever receive the swabs from Dr. Droulard.
>
> Without a conclusive showing that the State had those, I believe Mr. Bishop's motion is unfounded; and even if the State did have them, his motion is unfounded, because of the testimony of Pam Server prior to the trial; that the possibility of obtaining a blood type grouping from those specimens were contingent upon several "if's." If enough semen was present. If it was not contaminated. If the types of blood characteristics were present in that semen, if it was even there; and from that it would not in any way be error on your part, Your Honor, to dismiss this motion because of the iffy contingency of the defense motion.
>
> This would be a mere tangential procedural technicality not warranting a dismissal of this case, and we would submit it on that argument.

The trial court denied defendant's motion.

We agree with appellant that under certain circumstances due process requires that the state preserve the swabs. We do not, however, accept appellant's assertion that the state's failure to preserve the swabs requires the dismissal of the case. When evidence with a potentially exculpatory value to a criminal defendant has been lost or destroyed by the state, there is nothing the court can do to restore the defendant to *exactly* the same position he would have been in had the evidence been preserved. However, there are remedial measures which the trial court can and should employ to ensure that the defendant receives a fair trial even though he no longer has access to exculpatory material which the prosecution had at one time already gathered.

In the present case, the trial court properly denied defendant's motion to dismiss because, in light of the circumstances (i.e. strong cumulative evidence of guilt), dismissal would have been an extreme sanction not warranted by the particular facts. The district court concluded that even if the defendant had the semen samples available for testing, such samples would yield test results that would only be material as to the lewd and lascivious conduct charge and could not possibly exonerate the defendant as to the kidnapping and murder charges. However, as defense counsel appropriately points out, the state offered no motive for the kidnapping and murder *other than* the sexual attack. There is no evidence to suggest that the killer and the sexual violator were not the same person. Thus, exclusion of the defendant as the sexual offender could exclude him from the other charges as well.

In California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984), the Court held that the due process clause of the fourteenth amendment does not require that law enforcement agencies preserve breath samples captured by an "Intoxilyzer" in order to introduce breath-analysis at trial and further explained the concept of constitutional materiality, which concept implicates the state's duty to preserve evidence. The Court stated:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S. at 109-110, 96 S.Ct. at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be

> of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

467 U.S. at 488-89 (footnote omitted).

As explained below, swabs may possess an exculpatory value in that they may be tested and the results of those tests may exclude a criminal defendant from that class of persons who could have committed the offense. As a rule, the defendant does not have available to him other comparable evidence. Hence, under federal law the Constitution imposes on the states the duty to preserve semen samples which the state has already collected in a prosecution for sexual offenses as the samples might be expected to play a significant role in the suspect's defense.

Tests have been devised to type seminal fluid. These tests, while of value in helping to identify a rape suspect, are similar to blood tests in that they do not positively identify a person as the perpetrator of the crime but may exclude the person suspected. 65 Am.Jur.2d *Rape* § 63 (1972). Evidence regarding the analysis and identification of seminal fluid is not always conclusive for purposes of identification. It is nevertheless admissible and may have considerable bearing on cases dealing with rape, criminal assault, homicide, or a combination of all three. Seminal fluid can sometimes be typed by the same classifications as blood types. This means that seminal fluid found at the scene of a sex offense may be typed, and then matched or compared with the blood type of the suspect or accused. *Although a person cannot be conclusively identified in this manner, the matching process may aid in excluding persons wrongfully accused of a sex crime.*

Under ideal conditions, seminal fluid may be typed or grouped in much the same manner as blood is typed – as type A, AB, B, and O. However, unlike blood, it is not always possible to type or identify human semen as representative of one of the four basic blood groups. The person from whom the sample is taken must be a so-called "secretor." It is estimated that from seventy-five to eighty percent of all human beings are considered to be "secretors;" that is, they possess, in fluids other than their blood, certain material properties that tend to be classified as would blood. Fain is a Type A secretor. In some instances, it has been possible to classify not only an individual's semen but also his saliva, fingernails, hair, and even fluid from a blister on some portion of his body. *See*, 2 A.L.R. 4th 500.

In People v. Hitch, 527 P.2d 361 (Cal. 1974), the California Supreme Court held that evidence is material if there is a reasonable possibility that the evidence would constitute evidence favorable to the defendant on the issue of guilt or innocence. The *Hitch* court held that the duty of disclosure of evidence to the defendant attaches in some form once the government has first gathered and taken possession of the evidence; *before the request for discovery has been made, the duty operates as the duty of preservation.*

The *Hitch* court cited United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) ("Bryant I") (result affirmed after remand in "Bryant II", United States v. Bryant, 448 F.2d 1182 (1971)), which suggested that, while sanctions should be imposed in cases of bad faith suppression of evidence, "[a]n exception for good faith loss of important evidence must not be allowed to swallow the discovery

rules, and the *burden of explanation on the Government must be a heavy one;* but criminal convictions otherwise based on sufficient evidence may be permitted to stand *so long as the Government made 'earnest efforts' to preserve crucial materials and to find them once a discovery request is made."* 527 P.2d at 369. (Emphasis in original) (quoting 439 F.2d at 651-52). The *Hitch* court concluded:

> For the future, 'earnest efforts' will be defined quite strictly. . . . Of course, the regular procedures for preservation must be adequate to the task. Systematic non-preservation of tapes involving Government undercover agents – as in the cases before us – might be regular, but would be insufficiently protective of defendants' right to discovery. Accordingly, we hold that *sanctions for nondisclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence* gathered in the course of a criminal investigation. *The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse . . .*
>
> A right so crucial as that of disclosure ought not to be built on . . . shifting sands. It ought, rather, to be protected by rules, systematically applied and systematically enforced. (Emphasis in part in original, in part added.)

527 P.2d at 369 (quoting 439 F.2d at 652) (footnote omitted).

In People v. Nation, 604 P.2d 1051 (Cal. 1980), the California court held that the prosecutor has the duty to disclose material evidence favorable to the accused even in the absence of a request from the defense. The *Nation* court further held that if the state recovers a semen

sample of one who has made a sexual assault or has perpetrated a rape or attempted rape, the authorities must take reasonable measures to adequately preserve the evidence and to make it available to the defense, noting that *an analysis of the semen sample might not only impeach the credibility of the prosecution's witnesses but also might completely exonerate the defendant*. The *Nation* court further stated, "[w]hether or not the police deem the crime sufficiently important to warrant such an identification analysis, *they cannot make the decision for the defendant*." 604 P.2d at 1055 (emphasis added).

The *Nation* court established *as a matter of law* that with respect to semen samples obtained from the vagina of an alleged rape victim, the sample is *material evidence* requiring preservation. However, as the following cases illustrate, the sanctions to be imposed depend upon the particular circumstances attendant to the loss or destruction of the material evidence in each case. People v. Moore, 666 P.2d 419 (Cal. 1983).

In State v. Mitchell, 683 P.2d 750 (1984), the Arizona Court of Appeals stated, "[w]e agree with the California court and hold that the law enforcement officers have a duty to preserve the semen samples in a rape case, including refrigerating them." 683 P.2d at 754. In *Mitchell*, the court held that the state's failure to preserve a semen sample did not merit dismissal of a count, but only the suppression of any blood-grouping evidence. In *Mitchell*, such evidence had not been suppressed at trial; however, the court held that in light of the overwhelming evidence in the case, including the victim's identification of the defendant, the trial court's failure to suppress constituted harmless error beyond a reasonable doubt.

The State contends that no consequences should attach to its failure to preserve the semen samples because Dr. Droulard was not working for the prosecution. This contention is not persuasive. In State v. Vaster, 659 P.2d 528 (Wash. 1983), the court held that the duty to preserve evidence applies *not only to the prosecution, but also to its agents acting under prosecutorial authority.* In *Vaster,* the court concluded that even though the police did not have physical control over vaginal samples destroyed prior to the defendant's trial for rape, they were properly held responsible for their destruction, where their silence, in response to the medical center's notice that the vaginal samples were to be destroyed, indicated permission, albeit unintentional, that the sample be destroyed.

Here, we are not suggesting that Dr. Droulard was biased in any way or that he approached the autopsy in anything but a professional manner. However, he made his examinations and took the samples at the request of deputy sheriff Rodriguez, who was present throughout the examination. Regardless of whether Officer Rodriguez's testimony as to what transpired with the swabs is accurate or whether Dr. Droulard's account is accurate, under *either* account it is clear that at all relevant times *either* Dr. Droulard *or* Officer Rodriguez had possession of the swabs, which samples might have contained material evidence where, as here, the defendant is charged with a sexual offense. Moreover, even if Dr. Droulard were *not* deemed to be a state agent, Officer Rodriguez, having at least constructive control of the swabs, should have used earnest efforts to prevent the doctor from disposing of the swabs if, as Officer

Rodriguez testified, the doctor in fact disposed of the swabs.

More recently, the Arizona Court of Appeals required dismissal in both State v. Youngblood, 734 P.2d 592 (Ariz.Ct.App. 1986), and State v. Escalante, 734 P.2d 597 (Ariz.Ct.App. 1986). In *Escalante*, the state failed to preserve semen stain evidence which had the potential to exonerate the defendant. The court stated that:

> [w]hen identity is an issue at trial, and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say, beyond a reasonable doubt, that the destroyed evidence would not have proved exonerating. The cases that discuss the remedy for a denial of due process of this type do not speak in quite these terms. Instead, they tend to cast the inquiry in terms of prejudice to the defendant, *i.e.*, the denial of due process is prejudicial when the case against the defendant is weak and not prejudicial when it is strong. We believe the result is the same regardless of how the test is framed.
>
> Here we cannot say that the evidence against Escalante was so strong that the loss of the evidence was harmless beyond a reasonable doubt.

734 P.2d at 603.

In determining that the evidence was not so strong as to render the loss of evidence harmless beyond a reasonable doubt, the court noted the existence in that case of mistaken and conflicting identifications of both the attacker and the attacker's car.

In Crockett v. State, 603 P.2d 1078, 1081 (Nev. 1979), the court stated, "[W]hen evidence is lost as a result of inadequate governmental handling, a conviction may be reversed." There the defendant was convicted of rape and second degree murder based entirely on circumstantial evidence. The court held that the failure of lab technicians to report blood-grouping tests of the vaginal swab which were possibly exculpatory, and the intentional discarding of a sperm slide so prejudiced the defendant as to violate his due process right to a fair trial. The Nevada court stated:

> Unfortunately, scientific verification is forever foreclosed because the government admittedly did not properly preserve the swab. Further, the sperm slide, which easily could have been preserved, was intentionally, though not maliciously discarded. The State now seeks to benefit from its own faulty procedures by urging factual possibilities which proper procedures might well have foreclosed. We think this approach is legally untenable. We cannot permit speculative inferences adverse to Crockett to be derived from the absence of evidence which the State should have preserved. . . .
>
> This obviously is not a case where an otherwise prejudicial loss may be ignored on the ground that evidence of guilt is overwhelming.

603 P.2d at 1081-82.

In Deberry v. State, 457 A.2d 744 (Del. 1983), the court ruled that as a matter of prudence agencies that create rules for evidence preservation should broadly define discoverable evidence to include any material that could be favorable to the defendant. The *Deberry* court held that when examining the conduct of the state in the loss or destruction of evidence, the court should inquire

whether the evidence was lost or destroyed while in the state's custody, whether the state acted in disregard for the interests of the accused, whether the state was negligent in failing to adhere to established and reasonable standards of care or police and prosecutorial functions, whether its acts, if deliberate, were taken in good faith or were reasonably justified, and whether the government attorneys prosecuting the case participated in events leading to the loss or destruction of evidence. It further held that certain kinds of evidence, including the testimony of persons who had custody of the material, any procedures for preserving evidence, specific practices followed in the particular case and steps taken to recover lost material after discovery of the loss, were relevant to the inquiry into the state's conduct and the loss or destruction of evidence. The *Deberry* court held that when physical evidence such as the defendant's clothing is lost or otherwise becomes unavailable through some apparent fault of the police, the state bears a heavy burden of overcoming defendant's claim of prejudice, *and a haphazard explanation of the loss will be insufficient.* The court concluded that the state's failure to produce the defendant's clothes upon request or to conduct scientific tests, as was done on the apparel of the alleged rape victim, *permitted the inference that any scientific evidence obtained from such items would have been favorable to the defendant.* In *Deberry,* the defendant was not only charged with rape but also with kidnapping and a weapons charge. There, the court concluded that the kidnapping and weapons charges necessarily were interrelated with the rape conviction and could not stand independent of it.

In the present case, the government's "explanation" of the loss of the swab samples was, at best, less than clear. Moreover, here, as in *Deberry*, the appellant was not only charged with a sexual crime but with additional crimes as well. Likewise, in the present case, those additional charges were interrelated with the sexual crime and it is unlikely that they would stand independent of it.

The State also contends that, even had the swabs been preserved, they would have been useless as yielding only inconclusive or unreliable test results. This argument is not relevant in a due process analysis. In People v. Newsome, 186 Cal. Rptr. 676 (Cal.App. 1982), the court held that for purposes of determining whether to impose sanctions on the prosecution for failure to preserve a semen sample, a factual showing that a vaginal smear was taken from the complaining witness and that the swab showed the presence of seminal material required the trial court to treat the samples as material evidence, *despite the claim by the state that the swab was rendered immaterial in fact when the swab failed to yield useful test results when tested by the state.* In *Newsome*, the state argued that the swab was material evidence only in the abstract because two attempts to perform PGM typing yielded no useful results. There, the court concluded that the state's contention side-stepped the issue. The court stated:

> Assuming arguendo, that when tested . . . the swab's failure to yield useful PGM results rendered it at that point immaterial in fact (although the possibility remains that a test for ABO group may have been successful), the question remains whether its uselessness is attributable to the government's failure properly to preserve the evidence. . . .

> Moreover, in United States v. Bryant [citations omitted], the court held that the duty to preserve evidence applies to all discoverable evidence, and the tapes at issue in that case were no less discoverable because they were unintelligible; *"It is the defendant's right to discover such evidence and decide for himself. . . ."* (Emphasis added.)

186 Cal.Rptr. at 681 (quoting from United States v. Bryant (Bryant II), 448 F.2d 1182, 1184, fn. 1, (D.C. Cir. 1971)).

Even in the above cases which mandated dismissal of charges due to the state's failure to preserve material evidence, a method of analysis was utilized which is cognizant of the degree and weight of the evidence accumulated against the defendant as well as the degree of culpability of the State in failing to preserve material evidence. Indeed, a strong line of cases do more than just recognize the relative strengths and weaknesses of those variables, but actively balance the magnitude of the State's failure to perform its duty to preserve evidence against the degree of prejudice thereby sustained by the defendant. In State v. Vaster, 659 P.2d 528 (Wash. 1983), the court adopted a "balancing approach" and noted that, in that case, "there [was] extremely strong evidence of guilt" including an "unusually detailed eyewitness identification." 659 P.2d at 534. The *Vaster* court affirmed the conviction of the defendant despite the State's loss of a vaginal sample. The court also distinguished the cases of People v. Nation, *supra*, and Crockett v. State, *supra*, noting that:

> While the rationale of these cases appears persuasive, we note with interest that in both cases other evidence against the defendants was relatively weak.

659 P.2d at 533.

This kind of "balancing approach" was also used in United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979), cert. den. 445 U.S. 917, 100 S.Ct. 1279 (1980), wherein the court stated: "[t]he proper balance is that between the quality of the government's conduct and the degree of prejudice to the accused. The government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice." *Id.* at 1152. *See* also, United States v. Roberts, 779 F.2d 565 (9th Cir. 1986).

The Ninth Circuit is not alone in its adoption of such a "balancing test." In State v. Bailey, 475 A.2d 1045 (Vt. 1984), the court affirmed defendant's conviction for engaging in sexual acts with a person under the age of sixteen to whom he was not married, despite the state's failure to conduct testing calculated to show the presence of sperm on certain bedding present in the "rape kit." In balancing the "admitted negligence" of the State in failing to conduct the test against the prejudice to defendant from the denial of potential test results which were admittedly "relevant," the court stated that:

> [T]he omission must be evaluated in the context of the entire record. United States v. Agurs, *supra*, 427 U.S. at 112, 96 S.Ct. at 2402. We note there was strong evidence of defendant's guilt in this case. He made several damaging admissions to the arresting officer concerning his presence and conduct during the incident. He admitted to the officer that "he knew she was too young to be with him." We also note the fact that the complaining witness took the stand herself and testified in detail to the events of that day.

475 A.2d at 1052.

Recently, the balancing approach was again utilized in Commonwealth v. Willie, 510 N.E.2d 258 (Mass. 1987).

There, the court remanded to the trial court to conduct a determination of prejudice to the defendant from the commonwealth's failure to preserve certain semen deposits. The court noted that "[t]he Commonwealth's conduct is merely a factor to be weighed in determining its culpability. That culpability, if any, is then weighed along with the other two factors, materiality and prejudice, in determining whether, and to what extent, any remedy will be employed." 510 N.E.2d at 262. The court further noted that "[n]ormally, the remedy for suppression of exculpatory evidence is a new trial unless the Commonwealth's actions are so egregious that retrial would be unfair to the defendant, in which case dismissal may be appropriate. [Citation omitted]. Loss or destruction of evidence can engender similar sanctions." 510 N.E.2d at 262-63. Concurring in part and dissenting in part in *Willie*, Justice Liacos noted the disfavor in which the remedy of dismissal is held by the courts, quoting from People v. Kelly, 478 N.Y.S.2d 834, 837, 467 N.E.2d 498, 501 (1984), "[a]lthough the choice of 'appropriate' action is committed to the sound discretion of the trial court, as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence."

The remedy of retrial, rather than dismissal, was also found appropriate in Commonwealth v. Chapman, 386 A.2d 994 (Pa. 1978). In *Chapman*, the court ruled that where the undershorts of a defendant accused of rape had been destroyed between his first and second trial by the state and, where the absence of the undershorts denied the defendant the opportunity to prove conclusively that the undershorts belonged to someone else

and perhaps thereby to persuade the jury that someone else was the rapist, but where the defendant had failed to utilize this evidence available to him in the first trial, a new trial including a missing evidence instruction rather than dismissal was the appropriate sanction.

In this case an appropriate instruction would have read similar to the following:

> You may take note of the fact that the state had obtained bodily fluid samples from the body of the victim, that such samples are, as a matter of law, material evidence in that scientific tests are available which may exclude an individual from that class of persons who could have committed the crime, that the state lost or destroyed the samples, and that the defendant therefore did not have an opportunity to conduct such tests. The fact that the state lost or destroyed the samples does not, in itself, require that you acquit the defendant. It is, however, one factor for you to consider in your deliberations.

Based on the foregoing analysis, we have determined that the State did not deprive the defendant of due process by failing to preserve the semen samples it had obtained.

Utilizing the "balancing approach" already discussed, we note that the trial court specifically found on remand that the destruction of the swabs was inadvertent. Evidence adduced at trial included the testimony of two inmates who had shared a cell with Fain and who testified that he had claimed responsibility for the murder, and an admission made to another individual, from which it could be deduced that Fain had knowledge of the murder and its circumstances; a description of Fain's automobile furnished by a witness of the car in which the

victim was last seen riding; and the existence of similarity between a sample of Fain's pubic hair and pubic hairs found in the victim's panties.

We have little doubt that the circumstantial evidence presented, and from which the jury clearly drew the inference of appellant's guilt, was sufficient to sustain a conviction. We have concluded that although the evidence against Fain is circumstantial, it is nonetheless significant and weighty. In particular, the testimony of more than one person to whom Fain allegedly admitted guilt, as in *Bailey, supra,* indicates to us that dismissal would be an overly severe sanction.

We have most carefully reviewed the record and have concluded that were we to remand this case for retrial with the appropriate instruction that, ante, there is no likelihood that the result would be changed. We therefore decline to reverse the conviction finding that any error was harmless beyond a reasonable doubt.

VI. *THE DEATH PENALTY*

A.

Among his many attacks upon the constitutionality of the Idaho death penalty procedure, Fain contends that article I, § 7 of the Idaho Constitution guarantees him the right to have a jury pass upon whether he should receive the death sentence, contrary to our holdings in State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983), and, State v.

Sivak, 105 Idaho 900, 674 P.2d 396 (1983).[2] We continue to adhere to our holdings in those opinions.

Fain also contends that the constitutional requirement of proportionality has not been met in this case. The United States Supreme Court and this Court have held that the death penalty must be administered in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. Spaziano v. Florida, *supra;* State v. Aragon, 107 Idaho 358, 690 P.2d 293 (1984).

Comparing the circumstances and proof in this case to sentences imposed in similar cases, we cannot conclude that the sentence in the instant case was excessive or disproportionate. In 1983, in State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983), this Court conducted an extensive review of Idaho murder cases. We find the sentence imposed in the instant case is not disproportionate to the

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[2] The author and Justice Bistline continue to adhere to their dissents in *Creech, supra,* and *Sivak, supra,* and remain firm in their belief that the Idaho Constitution provides for *jury* participation in the capital sentencing process. We are further persuaded that a jury is required for the reasons articulated in *Adamson v. Ricketts,* (Ct. App. 9th Cir., December 22, 1988), but the majority of this Court does not concur with *Adamson* for the reasons articulated in *Charboneau v. State,* 1989 Slip Op. No. ___ , filed, ___, 1989. I write a separate opinion as to my view of the effect of *Adamson.*

Were I able to get a majority to reinvest Idaho juries with their constitutional powers in a given case, I would make the decision in that case *prospective* only and not apply it to other inmates on death row, which procedure has been approved by the United States Supreme Court in a line of cases including Jenkins V. Delaware, 395 U.S. 213, 218, 89 S.Ct. 1677 (1969).

sentence imposed in those cases reviewed in *Creech* where the death sentence was available as a form of punishment. We also have compared the instant case with our recent death penalty cases in State v. Creech, *supra*, and State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983), and find that the sentence imposed in the present case is not disproportionate to the sentences imposed in both of those cases.

The crime committed in the instant case was an intentional act perpetrated upon a helpless victim who did not provoke the attack. The kidnapping, sexual attack and drowning were brutal and perverse and could only have been intended to kill the victim. The crime committed in the present case is the same type of crime as that committed in State v. Aragon, *supra*. In *Aragon*, the defendant was convicted of first degree murder and was sentenced to death based upon the beating death of an eight-month old child. Thus, we conclude that the sentence imposed in this case is proportionate to those imposed in similar death cases.

Finally, we consider whether the trial court's findings of factors in mitigation and aggravation in determining whether to impose the death penalty were proper.

B.

Idaho's statutes and case law establish the limits for the factors properly to be considered as mitigating when making the determination of whether to impose the death penalty. In State v. Small, 107 Idaho 504, 690 P.2d 1336, 1338 (1984), this Court stated, "[i]t is improper for a legislature to limit the sentencing body's consideration of

mitigating factors to those enumerated in a statute." *See also,* State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981). In *Small,* we also emphasized that "the legislature's failure to list any mitigating factors in its capital sentencing scheme indicates its intent that the sentencing judge entertain the broadest of views in considering any and all matters appropriate to the determination of culpability," *supra,* at 1338. *See* also, State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953). The broadest of views must be entertained in considering all potentially mitigating factors.

The judge is also provided with express guidelines concerning aggravating factors in determining whether to impose the death penalty in I.C. § 19-2515. For the most part, the guidance provided in that code section is clear and appropriate. However, Fain contends that the trial court erroneously utilized I.C. § 19-2515(g) in assessing factors in aggravation in determining whether to impose the death penalty.

From the arguments and the evidence at trial in the instant case, the court found the following aggravating factors:

> (a) The murder was especially heinous and cruel manifesting exceptional depravity in that the defendant, a man of thirty-five years of age, abducted a nine-year-old girl off the street; took her to a remote site where he sexually assaulted her and then killed her.
>
> (b) The circumstances surrounding the killing exhibited utter disregard for human life and particularly as to an innocent child of tender years.

I.C. § 19-2515(g) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
>
> (1) The defendant was previously convicted of another murder.
>
> (2) At the time the murder was committed the defendant also committed another murder.
>
> (3) The defendant knowingly created a great risk of death to many persons.
>
> (4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.
>
> (5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
>
> (6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
>
> (7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.
>
> (8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
>
> (9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

> (10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

Fain contends the aggravating factor denoted by the trial court as "(a)," reflecting the language of I.C. § 19-2515(g)(5), and "(b)," reflecting the language of I.C. § 19-2515(g)(6) above, overlap. We disagree.

The aggravating factors specified in §§ 19-2515(g) (5) and (g)(6) describe two quite different kinds of culpability, each of which has been legislatively identified as a sentencing factor of special importance in cases where the death penalty may be imposed.

Section (g)(5), referring to the special heinousness, atrociousness or cruelty of the murder and the depravity of the act, specifically refers to the personal culpability of the killer exhibited by the manner in which the crime was committed. Thus, this factor was described in *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), as one that relates to cases where

> the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Gregg, 49 L.Ed.2d at 870. See *Gregg*, 49 L.Ed.2d at 886, n. 44.

This court took the same approach to characterizing the meaning of factor (g)(5) in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981):

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies –

> the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

102 Idaho at 418, quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

On the other hand, the "utter disregard" factor refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing another human being. In *Osborn*, the court explicitly construed the utter disregard factor as one referable to circumstances different from those encompassed by § 19-2515(g)(5):

> Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515(f)(6) mere surplusage [citation omitted], we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in Idaho Code §§ 19-2515(f)(2), (3) and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.

102 Idaho at 405.

The particularly cold-blooded killer need not act sadistically or in a particularly outrageous fashion in order to commit a killing with utter disregard for human life. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life. See e.g., *Tison v. Arizona*, ___ U.S. ___, 95 L.Ed.2d 127 (1987).

We therefore decline to reverse the judgment and order imposing the sentence on the basis of the asserted overlapping of aggravating factors.

C.

The fact that there is no overlap between I.C. § 19-2515(g)(5) and (6) does not conclude our consideration of the sentencing. In another opinion issued by this Court today, we have held that the trial court may sentence the defendant to death only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found, making imposition of death appropriate. *Charboneau v. State*, 1989 Slip Op. No. 44 (April 4, 1989). Here, the trial court imposed the death penalty for both the conviction of first degree murder and the conviction of first degree kidnapping. In each case the trial court found that the "mitigating factors" did not outweigh the "aggravating factors." It appears that the trial court incorrectly weighed all of the mitigating circumstances against all of the aggravating circumstances, collectively, rather than individually as required by Charboneau. For this reason, we vacate the sentence and remand for resentencing in accordance with our decision here and in *Charboneau*.

VII. *THE POST-CONVICTION ORDER*

On May 15, 1987, this Court ordered the filing of supplemental briefs on the issues of the findings on remand regarding the destroyed and potentially exculpatory evidence and further ordered the consolidation of all

collateral post-conviction issues into one single proceeding. Defendant Fain contends that this Court's order requiring such consolidation violated his constitutional right to equal protection since non-death penalty defendants are not required to raise and pursue all grounds for post-conviction relief under an equally restricted and limited time schedule. We disagree and reaffirm our position that such consolidation orders are appropriate in order to reasonably expedite the processing of these cases in a manner that both protects the defendant's right to fair trial, while also accommodating the public's interest in the elimination of endless delay occasioned by multiple, serial appeals. We have considered appellant's additional assignments of error and find them to be without merit.

Conviction affirmed, remanded for resentencing.

SHEPARD, C.J. concurs in the result.

BAKES, J., concurs in Parts I, II, III, IV, VI(A), (B) and (C), and VII; concurs specially in Part V.

JOHNSON, J., concurs as to Parts I, II (Chilton), III, IV, VI(A) and (C), and VII; concurs specially as to Part VI(B); and dissents as to Parts II (Roberson), and V.

BISTLINE, J., concurs in Part I; concurs specially in IV; and dissents as to Parts II, III, V, VI, VII.

SHEPARD, C.J. concurring in result.

I concur in the majority opinion except as to Part V in which I concur in the result.

As to Part V, I believe the majority's truncated view of the facts and its expressions of opinion regarding the

autopsy procedures are unnecessarily critical of the autopsy personnel and their procedures.

The argument of Fain focuses on one small aspect of the autopsy procedures, *i.e.*, the insertion of Q-tip like swabs into the various body cavities. The purpose of the procedure is to impregnate the cotton swab with liquid within the body cavity, and to allow microscopic examination for the existence of sperm. If sperm is so found, further analysis can be made. The cotton swabs were not preserved, and from that fact the defense constructs the following argument. *If* sperm had been deposited within any of the body cavities, and *if* after the body's three-day immersion in water any such sperm remained, and *if* the swabbing had picked up any such remaining sperm, and *if* microscopic examination had revealed that the sperm depositor was a "secretor," and *if* therefrom tests thereof could determine the blood type of the sperm depositor, and *if* such a determined blood type differed from that of the defendant, conceivably such evidence would be exculpatory of Fain. Such an attenuated argument fails to consider the uncontested facts surrounding the autopsy procedures which are not set forth in the majority opinion.

The undisputed record indicates that the pathologist, in accordance with standard medical procedures, used cotton Q-tip type swabs to collect samples of whatever fluid might be found in the vaginal, anal, nasal and oral cavities of the victim. Each swab was immediately thereafter wiped upon a glass slide for later microscopic examination. Tests were made upon the slides to determine if there was any sperm to be found in the victim's body cavities. Those slides gave no evidence of the presence of

sperm. Those slides were preserved. Thereafter, "washings" were made of the body cavities, which washings were preserved by refrigeration, and while available to the defense at the time of trial, were never examined.

This portion of the defendant's argument on appeal is built upon the foundation that if the swabs themselves had been preserved, that a year and a half later they would have remained in a condition viable for examination for sperm; that such examination might have revealed results at variance to the slides containing the materials deposited thereon from the swabs; that if the swabs remained viable, and if they revealed the presence of semen, that such hypothetical semen might have revealed if the depositor thereof was a secretor, and if the depositor was a secretor a blood type could possibly be identified as different from that of Fain.

I suggest that such argument is nothing but hopeful speculation without any reasonable foundation therefor. An applicant for post-conviction relief has the burden of demonstrating by a preponderance of the evidence the allegations on which his petition is based. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969). Where as here there is competent and substantial evidence to support a decision made after an evidentiary hearing on an application for post-conviction relief, that decision will not be disturbed on appeal. *Heck v. State*, 103 Idaho 648, 651 P.2d 582 (Ct.App. 1982); *Lipps v. State*, 94 Idaho 185, 484 P.2d 734 (1971); *State v. Hinkley*, 93 Idaho 872, 477 P.2d 495 (1970). Here, Fain was required to demonstrate that the lost swabs contained evidence that would be material to his guilt or innocence. As stated in *California v. Trombetta*, 467

U.S. 479 (1984), the "evidence must possess an exculpatory value that was apparent before the evidence was destroyed . . . "

The majority strongly suggests that the swabs should have been preserved. There is no contention that standard autopsy procedures required such preservation of the swabs after smears had been made upon the glass microscopic slides. It is suggested that the existence of a "sex crime kit" required the preservation of the swabs. There is no showing in this record that such "sex crime kit," which was in the custody of a police officer present at the autopsy, constituted any legal authority which required the pathologist to vary his standard autopsy procedures. Likewise, there is no showing that the law enforcement officer was possessed of any authority to direct or supervise the conduct of the autopsy or to require that the pathologist vary his usual autopsy procedures.

Lastly, I would point out that the record discloses that prior to trial the defense refused to permit any testing of the sperm of the defendant. It was only at post-conviction proceedings when the absence of the swabs became apparent, that the defendant then indicated a willingness to have tests made of his sperm.

I would affirm the findings and conclusions of the trial court pertaining to the failure to preserve the swabs.

BAKES, J., concurring specially:

Part V of this Court's plurality opinion relies on *People v. Hitch*, 527 P.2d 361 (Cal. 1974), which states that

"once the government has first gathered and taken possession of the evidence," there is a "duty of preservation . . . before the request for discovery has been made," and a duty to disclose after the request for discovery is made. *Ante* at 18. Furthermore, the opinion states that *"so long as the government made 'earnest efforts' to preserve crucial materials and to find them once a discovery request is made,"* no constitutional violation has occurred. *Ante* at 18. However, Part V of the opinion does not adequately relate all of the facts which were found by the district court in support of its conclusion that no due process violation occurred in this case. All of the witnesses testified that samples of the victim's various body cavity fluids were collected on swabs by Dr. Droulard, the pathologist, and the fluids on those swabs were then transferred onto glass slides which were tested and preserved. The only conflict in the testimony was whether, after the swabs were used to make the glass slides, they were discarded by the doctor, as Officer Rodriguez testified, or by Officer Rodriguez, as Dr. Droulard testified. The trial court, after observing the witnesses testify, resolved this conflict in the testimony, concluding that it was Dr. Droulard who discarded them. While the technician, Pam Server, testified that the fluids transferred onto the glass slides would not be as concentrated as the fluids on the swabs themselves, there is nothing in the record to show that Officer Rodriguez knew or should reasonably have known that when Dr. Droulard transferred the bodily fluids onto the glass slides that he was not employing accepted scientific means for testing and preserving evidence. I think it would be expecting too much of an ordinary police officer to understand that the medical doctor's actions in

making the slides and then discarding the swabs was not an accepted scientific method of testing and preserving any potential evidence. The trial court specifically found that the destruction of the swabs was inadvertent. That finding is supported by the record. I believe the record also reflects that "the government made 'earnest efforts' to preserve the critical materials" within the meaning of the *Hitch* case relied on by the majority. *Ante* at 18.

However, the most recent test enunciated by the United State Supreme Court regarding the states' obligation to preserve potentially exculpatory evidence was set out in *Arizona v. Youngblood*, ___ U.S. ___, ___ S.Ct. ___ (1988). In that case, which also involved the preservation of swabs and other physical evidence in a sexual molestation case, the United States Supreme Court reversed the Arizona courts which had held that the state's failure to preserve semen samples from the victim's body (swabs) and clothing had violated due process. The United States Supreme Court rejected both the "earnest efforts" test, and the "negligent failure to preserve" test of *People v. Hitch*, 527 P.2d 361 (Cal. 1974), relied on in Part V of this Court's plurality opinion. The Court in *Arizona v. Youngblood*, stated, "The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent." However, the Court held that was not enough to constitute a due process violation. The Court concluded by holding that "[w]e therefore hold that unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process."

There is no evidence here of any bad faith upon the part of Officer Rodriguez. The trial court specifically found that it was Dr. Droulard, and not Officer Rodriguez, who discarded the swabs. The trial court further found that that discarding was inadvertent and not intentional. Accordingly, the trial court did not err in concluding that Fain's rights to due process were not violated.

HUNTLEY, J., concurring and dissenting.

While I support the death penalty and concur in the bulk of the majority opinion, I respectfully suggest that Idaho's present capital sentencing procedure is unconstitutional because it removes the jury from its constitutional fact-finding role. Our process violates the federal constitution for the reasons stated in Adamson v. Ricketts, (Ct. App. 9th Cir., December 22, 1988) and violates the Idaho Constitution for the reasons I have articulated in State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983) and State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983). I will discuss each analysis in turn.

I.

The Jury as Fundamental to Preserving Democracy

The determination of the issue presented on appeal should be made in the context of the history and purposes of the right to trial by jury. Our forefathers wisely provided in Article 1, Section 7 of the Idaho Constitution: "The right to trial by jury shall remain inviolate . . . " They so provided because they recognized that the jury

system is the single most important guardian of the people's right to be protected from oppressive and overreaching government.

Few Americans realize that the right to jury trial in civil cases has almost been lost in England. English judges, with the acquiescence of a compliant bar, have totally eliminated the right to trial by jury in civil cases, except in cases of libel or slander. The English themselves seem to have forgotten the words of their eminent jurist, Blackstone, who wrote that trial by jury is:

> . . . the glory of the English law . . . [i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals.

Blackstone Commentaries 79.

Some American judges and legislators have similarly lost touch with the following language in our Declaration of Independence:

> [George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: . . . For depriving us, in many cases, of the benefits of trial by jury . . .

The French philosopher and essayist, de Tocqueville, who understood and appreciated democracy in America with keener insight than any other observer of the Nineteenth Century, stated that the jury system in America:

> . . . places the real direction of society in the hands of the governed . . . and not in . . . the government . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority and to direct society,

instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

II.

The Federal Right to Jury Fact Finding in Capital Cases

In *Adamson v. Ricketts*, the 9th Circuit stated the issue:

> Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree.

The Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona statutory scheme. Noteworthy is the fact that Idaho and Arizona are two of only four states which have the death penalty which have taken the jury out of the fact-finding process of making the ultimate determination as to whether the death penalty is appropriate. The fact that thirty-one of the thirty-five states which have the death penalty utilize the jury in making that determination speaks volumes as to what our Anglo-American traditions and constitutions require.

As the Adamson court noted:

> An aggravating "circumstance" which elevates a murder to a "death-eligible" murder in the penalty phase, remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial. Like an element of a crime, an aggravating circumstance in the Arizona scheme informs the prosecutor what facts must be proven to obtain a conviction. The circumstance must be proven beyond a reasonable doubt. The hearing is adversarial, with oral argument and the prosecution's presentation of evidence governed by the usual rules of evidence. The presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances. If the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation or the death penalty will be imposed. A.R.S. § 13-703; see also Arizona v. Rumsey, 467 U.S. 203, 21 (1984). If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death. Cf. Poland v. Arizona, 106 S.Ct. 1749, 17454 (1986) (Court framed the relevant [*39] inquiry as "whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case for the death penalty and hence has 'acquitted' petitioners"); Rumsey, 467 U.S. at 212 (where findings of fact at sentencing hearing were all favorable to defendant, he was "acquitted" of the death penalty).

Although Idaho's majority in *Charboneau*, similarly to the judiciary in Arizona and the prosecutors in both states, urge that a trial court in finding facts as to aggravating circumstances is exercising a "sentencing determination" as distinguished from finding the elements of a death-eligible murder, their use of the language in justifying that position frequently results in Freudian slips

which indicate otherwise. In fact, to rule for the state's position it is necessary to do exactly what the majority did in *Charboneau,* that is, engage in a circular argument, the majority reasoning at pages 28-29:

> To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. *The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder.* It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

The sentence I have underscored is totally circular. Of course, if one can pronounce that the circumstances are part of sentencing and not part of the elements of a death penalty crime, then they are not elements of a death penalty crime.

The plain fact is, before a person is eligible to be executed, a *finding* must be made that the aggravating circumstance existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty.

It could of course be argued that my position is circular if I were to take the underscored sentence from the majority opinion, *supra,* and restate it as follows:

> The circumstances listed in the statute are not circumstances to be considered in sentencing but are elements of death-eligible murder.

However, I would submit that the issue is best resolved by recognizing that it is traditional and accepted jurisprudence that every factor required to prove a crime is considered an element of that crime. One cannot be sentenced to death without the finding of the aggravating circumstances having taken place and, thus, they would appear to be essential elements of the crime rather than some less important procedural matters occurring during sentencing.

The United States Supreme Court has not passed directly upon the issue presented in this case, but what it has written about the jury and its function in death penalty cases indicates that the process would be best served by bringing the four states in line at this time.

Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are "the cross-section of the community," reflecting community values. *Duren v. Missouri*, 439 U.S. 357, 359 99 S.Ct. 664, 666, 58 L.Ed.2d 579 (1979). Only a representative jury assures "meaningful community participation." *Ballew v. Georgia*, 435 U.S. 223, 235 98 S.Ct. 1029, 1036, 55 L.Ed.2d 234 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and backgrounds, *Taylor v. Louisiana*, 419 U.S. 522, 531-33 95 S.Ct. 692, 698-699, 42

L.Ed.2d 690 (1975); the different segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result," *id.* at 532 n. 12 95 S.Ct. at 698 n. 12. See *Humphrey v. Cady*, 405 U.S. 504, 509 92 s.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. *Ballew v. Georgia, supra,* 435 U.S. at 232 98 S.Ct. at 1035.[3] Twelve individuals are obviously more likely to reflect the prevailing views of society than one person.[4]

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois, supra,* 391 U.S. at 519-20 88 S.Ct.at 1775-1776. "The jury . . . is a significant and reliable objective index of

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[3] *Ballew* also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia,* 435 U.S. 223, 232-39 [98 S.Ct. 1029, 1035-38, 55 L.Ed.2d 234] (1978) (plurality opinion).

[4] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. *S.Gillers, Deciding Who Dies,* 129 U.Pa.L.Rev. 63, n. 298.

contemporary values because it is so directly involved," *Gregg v. Georgia, supra,* 428 U.S. at 181 96 s.Ct. at 2928. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since "[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits." *Dennis v. United States,* 341 U.S. 494, 525 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[5] made even more difficult because judges –

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[5] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, *Public Opinion and Federal Judicial Policy,* 21 Am.J.Pol.Sci. 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Aeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stan.L.Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

whether considered in terms of race, sex, or economic class – do not reflect the wide range of backgrounds or beliefs within the community.[6] "[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," *Gregg v. Georgia, supra,* 428 U.S. at 182 96 S.Ct. at 2929. For a variety of reasons, judges appear less likely to reflect that same reluctance.[7]

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[6] As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from $24,000 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: *The End of Tokenism, in Women in the Courts,* 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, Number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

[7] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant only 72 percent of the time. *H. Kalven & H. Zeisel, The American Jury,* 68 (1966). In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, *id.* at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which

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either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent only the judge would have voted for the death penalty, yet in only 20 percent of the cases would the jury but not the judge vote for execution. Thus, the juries were essentially twice as lenient as the judges. *Ibid.* As a United Nations Report concludes:

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science or criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

United Nations, Dept. of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10-64) (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. See, *e.g., Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982). Kalven and Zeisel discovered in more than one judge "a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach" *Kalven & Zeisel, supra*, at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion would seem to be wholly lawful. As one judge said of draft evasion cases: "I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose." Cook, *Sentencing Behavior of Federal Judges*: Draft Cases – 1972, 42 Cinn.L.Rev. 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike individual jurors) accrue experience in a given type of case,

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As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process " 'places the real direction of society in the hands of the governed . . . and not in . . . the government.' " Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L.Rev. 1, 5 (1966) quoting de Tocqueville, Democracy in America 282 (Reeve Tran.1948). Quintessentially, the right to a jury "is granted to criminal defendants in order to prevent oppression by the government," *Duncan v. Louisiana*, 391 U.S. 145, 155 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968), and to protect against "arbitrary action" by the compliant, biased, or eccentric judge. *Id.* at 156 88 S.Ct. at 1451. It "reflects a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges." *Ibid.*[8] These concerns are

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their sentencing settles into distinct and regular patterns of severity or leniency, *id.*, at 602-03, so that the judge's first decision whether a person lives or dies may inspire far more deliberation and consideration than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies cited in *Gillers, supra*, note 3, at 67-68 n. 318, report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judges' decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases.

[8] The *Profitt* plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the

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even more compelling where life stands immediately in the balance.

III.

The Idaho Constitutional Mandate

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

"Right to trial by jury. – The right of trial by jury shall remain inviolate . . . ." That right of trial by jury as it

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imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," *Proffitt v. Florida*, 428 U.S. 242, 252 96 S.Ct. 2960, 2966, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. *Id.* at 249-50 96 S.Ct. at 2965-2966. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. *Gillers, supra*, note 3, at 58-59. *Cook, Public Opinion and Federal Judicial Policy*, 21 Am.J.Poli.Sci. 567, 623 (1977). Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19-2827. See, *Gregg v. Georgia*, 428 U.S., at 204-06 96 S.Ct. at 2939-2940; *id.* at 211-12, 96 S.Ct. at 2942-2943 (White, J., concurring).

existed at the time our constitution was adopted, provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> [A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.

Section 17 was carried over verbatim into Revised Statute § 6563 (1887) enacted two years before the adoption of the Constitution.

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In *Blue Note Inc v. Hopper*, 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

> The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.

Accord. Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); *Christensen v. Hollingsworth*, 6 Idaho 87, 53 P. 211 (1898); *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme court of the United States struck down the death penalty statutes of most states through its 1972 decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of *Furman*, I.C. § 18-4004 read:

> Punishment for murder. – Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

In its first post-*Furman* session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the "cruel and unusual punishment" aspects disapproved in *Furman*. I.C. § 18-4004 was amended by striking out the words as lined out below:

> 18-4004. PUNISHMENT FOR MURDER. – Every person guilty of murder in the first degree shall suffer death ~~or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted.~~ Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

The 1973 Amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19-2515:

> 18-4004. PUNISHMENT FOR MURDER. ~~Every~~ Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder ~~in~~ of the first degree shall ~~suffer~~ be punished by death or by imprisonment for life. Every person guilty of murder ~~in~~ of the second degree is punishable by imprisonment ~~in the state prison~~ not less than ten (10) years and the imprisonment may extend to life.

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. *McGautha v. California*, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 29 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina*, 428 U.S. 280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the Furman decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of

involving jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

RS 1954
S 1082
STATEMENT OF PURPOSE

> Only a few years ago, the United States Supreme court made new "rules" concerning the imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Section 18-4003 and 18-4004, Idaho Code.
>
> Then, last year, the United States Supreme court again changed the rules relating to capital punishment – after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.
>
> *The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions* on capital punishment so that we will conform with this latest expression of the law. (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests that the Supreme Court decisions mandated the removal of the jury from its traditional powers and functions; the United States Supreme court never at an earlier

time or in this "latest expression of the law" required jury non-involvement.

Since jury participation in the capital sentencing process is part of the right to "trial by jury" as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

IV.

Interim Solution by District Judges

Since this Court has not seen fit to bring the Idaho sentencing process into a constitutional posture, and since the current session of the Idaho Legislature has not even formally taken up the effect of *Adamson*, we are undoubtably going to be faced with a year or more of uncertainty while we await the review of *Adamson* by the United States Supreme Court on Certiorari. Should the 9th Circuit be affirmed, then all death sentence cases in Idaho which have been imposed in that interim period will have to be reversed and remanded for resentencing, if not a total new trial. I believe there is a method whereby our Idaho district judges, exercising their intelligence and their plenary power, can bring order to this chaos and validly complete capital cases. It has always been the law of Idaho that district judges have the power to call for advisory juries in cases where juries are not mandated by statute or common law. Our district judges could, on their own motion, adopt the procedures of the

thirty-one other states by bifurcating the trial and bringing the jury in as an advisory jury at the sentencing phase. So that the jury would be fully apprised of the seriousness of its undertaking, the district judge would inform the jury that he would not impose the death penalty unless they so recommended. The district judge would, of course, retain his traditional power under Idaho law to impose a sentence less than death if he deemed such reduction appropriate. By engaging in this procedure, a district judge would not only be doing a service to the taxpayers by way of judicial economy in obviating the need for retrials or resentencing, but additionally the court would be properly serving both society and the defendant by protecting the constitutional right to trial by jury.

JOHNSON, J., concurring, concurring specially, and dissenting.

I concur with the majority opinion with regard to parts I (The Preliminary Hearing), III (Transcript of Fain's Statement), IV (Fain's Polygraph Test), and VII (The Post-Conviction Order). I concur with part II (Admission of Cellmates' Testimony), so far as it relates to the testimony of Ricky Lee Chilton and to the refusal to require Bobby Roberson to submit to a psychiatric examination or to take a polygraph test. I concur with part VI (The Death Penalty), so far as it relates to the right to jury sentencing, to proportionality, and to the weighing of aggravating and mitigating circumstances. I concur specially with part VI, so far as it relates to the lack of overlap of I.C. § 19-2515(g)(5) and (6). I dissent with regard to part II, so

far as it relates to the testimony of Bobby Roberson and to part V (The Destroyed Swabs).

THE OVERLAP OF I.C. § 19-2515(G)(5) AND (6)

I concur specially with that portion of part VI of the majority opinion, so far as it relates to the lack of overlap of I.C. § 19-2515(g)(5) and (6). In my view there is some overlap between these two aggravating circumstances, but this overlap does not cause any problem, so long as the mitigating circumstances are weighed against each aggravating circumstances found, individually. *Charboneau v. State*, 1989 Slip Op. No. ___ (March ___, 1989).

Any overlap does not prejudice the defendant, since whatever element is included in I.C. § 19-2515(g)(5) that is also included in I.C. § 19-2515(g)(6) is weighed only once when each of these circumstances is weighed against all the mitigating circumstances. Only if the mitigating circumstances were weighed against all of the aggravating circumstances, collectively, would the overlap cause a problem. In that case the element that was overlapped would, in effect, have been included twice on the aggravating side. In my view, this would be impermissible.

ADMISSION OF THE TESTIMONY OF BOBBY ROBERSON

Because this is a death penalty case, we should apply special care in determining whether Fain's rights have been violated. *Cf., State v. Scroggins*, 110 Idaho 380, 387, 716 P.2d 1152, 1159 (1985) (This Court must review a death sentence in a manner "qualitatively different than

our review of an ordinary criminal sentence."); *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2710 (1988) (Justice O'Connor stated that "the death penalty has been treated differently from all other punishments.") In my view the admission of the testimony of Bobby Roberson about what Fain told him after he was returned to Fain's cell following an interview with a detective violated Fain's rights under the sixth amendment to the United States Constitution and art. 1, § 13 of the Idaho Constitution.

In reaching my conclusion on this aspect of the case I have been guided by the decision of our Court of Appeals in *State v. Currington*, 113 Idaho 538, 746 P.2d 997 (Idaho App. 1987), *rev. den.* (1988). Because we denied review in *Currington*, I believe it is now binding on this Court as controlling precedent.

The following facts concerning Roberson's testimony appear in the record of this case:

1. Roberson was transferred by the jailer from cell P-3 to Fain's cell. (Tr., p. 756.)

2. Approximately an hour and one-half after Roberson was put in the cell with Fain, Fain came to Roberson and said, "I suppose you might want to know the reason I'm in the cell." Fain then explained to Roberson the reason he was there. (Tr., p. 726.)

3. Fain and another person in the cell were having conversation about sexual conduct with little girls. (Tr., p. 726.)

4. Roberson told the director of detention of the Canyon County jail that he wanted to see a detective. He said he had information concerning what Fain had been telling the inmates in the next cell concerning his actions in a crime. (Tr., pp. 757-58.)

5. The director of detention acted upon Roberson's request by getting him to see Detective Hensen. Hensen was in charge of criminal investigation for the Canyon County Sheriff's office. (Tr., pp. 759-61.)

6. The director of detention was aware that Fain was represented by counsel. (Tr., p. 762.)

7. Hensen was engaged in the investigation regarding the disappearance and death of Daralyn Johnson and had testified at Fain's preliminary hearing approximately three weeks earlier. (Tr. of Preliminary Hearing, pp. 164-85.)

8. Roberson informed Hensen of Fain's conversation with another inmate about having sex with young girls. (Tr., p. 727.)

9. Roberson told Hensen he would stay in the cell with Fain and see if he could help on the case. Hensen told Roberson that it would be of no value because of legal problems it would encounter and that Hensen did not care to discuss it with Roberson. Hensen did not want Roberson "to become an agent for the Canyon County Sheriff's office." (Tr., pp. 710, 721.)

10. Hensen told Roberson he would try and see if he could get Roberson moved from Fain's cell, but that it might take a day to a day and one-half, or even longer. Hensen told Roberson he would do his best to see if he could get Roberson transferred. (Tr., p. 727.)

11. When Roberson left Hensen's office, Hensen assumed that Roberson was going back to Fain's cell. Hensen assured Roberson that he would get hold of the jail supervisor and see if he could assist in getting Roberson moved out. (Tr., pp. 717-18.)

12. Hensen knew that Fain was represented by counsel. Hensen did not attempt to contact Fain's attorney with regard to his conversation with Roberson. On the same day as the conversation with Roberson, Hensen did advise the prosecuting attorney's office of what Roberson had told him. (Tr., p. 718.)

13. Neither Hensen nor anyone else to his knowledge advised Fain that Roberson was in his cell obtaining information and providing it to Hensen. (Tr., p. 719.)

14. Hensen felt that some of the statements that Fain had made in Roberson's presence incriminated Fain. (Tr., pp. 723-34.)

15. Roberson remained in the cell for another night after he talked to Hensen. (Tr., p. 762.) Roberson recalls that it was approximately a day to a day

and one-half before he was transferred out of Fain's cell. (Tr., p. 727.)

16. While Roberson was in the cell with Fain, after Roberson had been to talk to Hensen, Fain came over and started talking again about the young girls, what he would do, and how it felt. Fain then began talking about picking up Daralyn Johnson and revealed to Roberson what he had done to her. (Tr., pp. 781-85.)

17. Roberson obtained two maps that Fain had drawn depicting where he had picked up Daralyn Johnson and where he had taken her. (State's Exhibit No. 43; Tr., p. 784.) Fain drew the maps after he told Roberson what he had done with the girl. Fain wadded the maps up in his hands and put them in the toilet. Roberson went over and sat on the stool, and when Fain walked away, Roberson picked the maps up out of the toilet and put them in his pants so that Fain couldn't see them. (Tr., pp. 736-37.)

18. Roberson asked the jailer if he could have paper and some pencils. (Tr., pp. 737-38.) Roberson used the paper and pencils to write notes of the information that he had obtained from Fain. (Tr., p. 736.)

19. After Roberson was transferred from Fain's cell, he had another conversation with Hensen in which he told Hensen what Fain had told him about what he had done with Daralyn Johnson. (Tr., p. 711.) Roberson also delivered to Hensen the maps that Fain had drawn. (Tr., p. 737.)

These facts distinguish this case from those cited in the majority opinion.

In *Currington* the Court of Appeals held that the State impermissibly took advantage of circumstances and violated the defendant's sixth amendment right to counsel through an informant's conversation with and recording of the conversation with the defendant who was free on bail. The Court of Appeals reviewed extensively the recent history of the right to assistance of counsel in the context of the testimony of informants about admissions made by defendants charged with the crime. The court invoked both the sixth amendment to the United States Constitution and art. 1, § 13 of the Idaho Constitution. After discussing *Massiah* and *Henry* cited by the majority here, the Court of Appeals discussed *Main v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985). There, a co-defendant approached state authorities because he had received anonymous threats. The police provided him with a telephone recording device and instructed him to record any threats or conversations had with the defendant. After recordings were made and reviewed by the police, the police attached a "body-wire" to the informant in advance of a meeting between the informant and the defendant to discuss their defense. At this meeting, which was scheduled by the defendant, the defendant made incriminating statements. The Supreme Court held that the sixth and fourteenth amendments barred admission of the statements with respect to pending, charged crimes.

In reviewing the Supreme Court's decision in Moulton, the Court of Appeals in *Currington* focused on that part of the Supreme Court's opinion indicating that

the state took advantage of the circumstances in obtaining the incriminating statements. The Court of Appeals quoted the following passage from *Moulton*:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached. [Citation omitted.] *However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.* Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

113 Idaho at 542-43, 746 P.2d at 1001-02, *quoting Moulton*, 474 U.S. at 176, 106 S.Ct. at 487 (emphasis added in *Currington*).

After discussing *Kuhlmann*, cited by the majority, the Court of Appeals stated that "as illustrated by *Henry* and *Moulton*, the Sixth Amendment may apply, although the defendant initiated the conversation, if the state exploited a relationship or a set of circumstances where incriminating statements were likely to be made." *Id.* at 544, 746 P.2d at 1003.

I have read with interest the case of *United States v. Yeager*, 428 F.2d 182 (3rd Cir. 1970). This case is the most factually similar case to the present case that I have seen. In *Yeager* the inmate who testified against the defendant had originally been placed in an adjoining cell. He had almost daily conversations with the defendant for a period of two months. He was then sent to a diagnostic center, apparently because of an emotional problem. At the center he was interviewed by two detectives investigating the defendant's case. Eventually he told the detectives what he had learned from the defendant. No promises were made by the detectives in return for this information. The detectives asked him to keep them informed of any further conversations. When he returned to the jail he was placed in a cell with the defendant, and he talked with the defendant with a view toward getting information for the prosecution. Later, the prosecutor agreed that if he would testify against the defendant, he would be allowed to serve a previously imposed two to four-year sentence in a prison other than Trenton, where the defendant had numerous friends. The trial court ruled that any statements made by the defendant to the informant after his return from the diagnostic center were inadmissible, because after the interview the prosecution had placed the informant in the cell with the defendant, and the informant had questioned the defendant for the purpose of giving information to the prosecutor. The trial court did allow the informant to testify about inculpatory statements made by the defendant prior to the informant's interview with the detectives in the diagnostic center.

While there are some distinctions with regard to the testimony of the informant in *Yeager*, and *Roberson* in this case, I am inclined to the view that those distinctions are not sufficient enough to dictate a different result here. None of the evidence Roberson obtained after his return to Fain's cell following his interview with Hensen should have been admitted.

THE MISSING SWABS

While I agree with much of the majority's analysis concerning the missing swabs, I cannot concur that the state did not deprive Fain of due process by failing to preserve them. In my view, the jury should have been instructed as requested by Fain. Fain's requested instruction read as follows:

> If you find from the evidence before you that the state or any agent of the state allowed material evidence to be destroyed, then you may infer that such evidence would have been against the interests of the state in seeking conviction.

This instruction was based on *State v. Willis*, 393 P.2d 274 (Ariz. 1964) and *State v. Hunter*, 664 P.2d 195 (Ariz. 1983). It focuses on evidence that the state has allowed to be destroyed. It fits the circumstances in this case and would leave to the jury the question of whether the state allowed the evidence to be destroyed and, if so, whether the missing evidence would affect the verdict of the jury.

BISTLINE, J., concurring in part, dissenting in part.

On the motion of defense counsel my involvement on this aged appeal commenced in December of 1987. Prior

to that I had no connection with the case. The Court having brought me into the case, I became acquainted with prior proceedings by reading briefs, listening to taped argument, examining the record, and then sat with the Court at a second oral argument in February 1988, three years after the first oral argument was presented. Justice Huntley's prefatory remarks explain the delay. I am not sufficiently informed as to the suspension of the appeal other than by the statement that it was "to enable a post-conviction proceeding to take place" and also for the additional briefing on the direct appeal by the defendant and, of course, the mandatory review. I am aware that the legislature or the Surpeme Court, or both acting in concert, have purposefully slowed down the processing of a capital defendant's direct appeal and statutory review on the basis of alleged efficiency. In one of the earlier death penalty cases I expressed the view that death penalty appeals and reviews should not be delayed, and that inexorably protracted and inexcusable delay could be to the death row inmate a form of cruel and inhumane punishment. State v. Osborn, 104 Idaho 809, 821 (1983). Such a defendant cannot be heard to complain of delay attributable to him, but unjustified state delay (even including the judicial department) is of a different ilk.

Justice Huntley has presented his views in this case in Parts I through VII. My views will be set forth in that same order.

I

Evidence received at the preliminary hearing need not be exhaustive. In Idaho it seldom is because all that is

needed is sufficient proof a crime having been committed – beyond dispute in this case – and probable cause that the accused was the perpetrator. *State v. Villareal*, 94 Idaho 246, 486 P.2d 257 (1971), and *State v. Elisondo*, Slip Op. No. 44, S. Ct. No. 17029, filed June 6, 1988. The evidence was sufficient to justify the magistrate in holding Fain to stand trial. I concur with Justice Huntley in Part I.

II A THE ROBERSON TESTIMONY

Justice Huntley's opinion does not tell why and how Roberson came to be in jail, and that information may not be available in this record. The Roberson testimony on its face gives little appearance of credibility. It may be noted that I have concurred in Justice Johnson's opinion regarding the admissibility of the testimony of Bobby Roberson. A defendant jailed on a charge of first degree murder and facing the death penalty is said to have volunteered to a stranger that he has indeed killed a child. Such is for certain far out of the normal. Justice Huntley does not, nor do any of the Court members who form a majority upholding the conviction, suggest that it is credible testimony. What the majority holds on that issue is based on this slender reed: Because the trial judge denied the suppression motion the majority infers that the judge found the testimony credible. This is supposed to follow from a preceding sentence which states: The judge denied the suppression motion because the judge believed Roberson's account of the circumstances under which defendant Fain spoke to Roberson in his cell. A California case is cited for the proposition that a witness's credibility is a question of fact to proposition that a witness's credibility is a question of fact be determined by the court in the

context of a suppression hearing. I have read the case. As to what that case is about and what bearing it has on the case before us, I do not care to comment, other than to say its holding is of passing interest and might be utilized in an appropriate circumstance.

In my view credulity is severely stretched to so readily accept as the majority does, that a defendant jailed on a charge of first degree murder and facing the death penalty is said to have volunteered to a stranger that he has indeed killed a child. Such is certainly out of the normal. Of course, anything is possible, even though highly improbable. But, for the reasons, and on the factual analysis made by Justice Johnson, the testimony of Roberson was definitely subject to the scrutiny of the *Massiah* rule which this Court first applied in the *LePage* case. Another valid objection to the use of Roberson's testimony was the failure of the prosecutor, in the first instance, and the trial judge in the second, to allow psychological and/or psychiatric testing and evaluation of Roberson. The majority opinion confuses credibility with competency. Credibility is a determination to be made by a jury. The competency of a witness is subject to challenge, I.C. § 9-202(1), and it is that determination which is for the court upon hearing the testimony of witnesses, including experts. 81 Am. Jur.2d, Witnesses, § 80 et seq; 148 A.L.R. 1140; *McNeely v. State*, 349 N.E.2d 204 (Ind.App. 1976); *People v. Reber*, Cal.Rptr. (1988). "When the competence of a witness to testify is challenged by timely objection it is the duty of the trial court to schedule a hearing in order to make a proper determination upon all the facts and evidence as to whether the witness is or is not competent to testify." *McNeely, supra*, at 207. In

the instant case the trial court refused to make any inquiry, notwithstanding the presentation of a prima facie case attacking Roberson's competency. This facet of the trial was brought to our attention in Fain's opening appellate brief:

> **VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN HE REFUSED TO PERMIT THE DEFENSE TO SUBJECT A CRUCIAL STATE WITNESS TO A PSYCHIATRIC AND/OR POLYGRAPH EXAMINATION.**

The evidence against this defendant, but for the testimony of highly suspect cell-mates, was totally circumstantial. Thus, the testimony of the cell-mates became extremely critical, for it was a matter of pitting their word against that of the defendant. The testimony of Roberson was especially critical, and because of his background of mental problems, the defense requested that he be evaluated psychiatrically in order to determine his stability as a witness. Even though there are cases making it clear that the trial court has great discretion in permitting such examinations in order to permit the jury to have a full picture as to credibility, the trial court here exercised no discretion at all. He stated 'it's certainly not my intent to wander into the never-never land of having witnesses evaluated by a psychiatrist before they are even presented to the Court – never.' (Tr. Motions 26) To refuse to exercise discretion is not to act with discretion; by his refusal to even consider the request the trial judge abused that discretion given him. And, with all due respect, the 'never-never land' referred to by the trial judge has been wandered into by some very respectable courts. In fact, in the case of *State v. Landis Dillard,* a case very familiar to

this Court, Judge Doolittle himself wandered into the "never-never land" and permitted a psychologist to present his views as to the dual personality of the defendant. In view of such conflicting decisions coming from the same trial judge, the defendant wonders whether equal protection has any real meaning?

It has been recognized that:

> "The psychologically abnormal witness can present a serious obstacle to fact finding in the judicial process. Almost any emotional or mental defect may materially affect the accuracy of testimony; a conservative list of such defects would have to include the psychosis, most or all of the neurosis, defects in the structure of the nervous system, mental deficiency, alcoholism, drug addiction, and psychopathic personality." Juliver, "Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach", 48 Cal. L. Rev. 648 (1960).

The witness Bobby Roberson certainly fits within the description set forth.

Roberson was the defendant's cell mate during pretrial incarceration. He was the step-son of a member of the Canyon County jail staff. The devastating effect of Roberson's testimony as to the defendant's detailed description of the kidnapping, sexual molestation, and killing of Daralyn Johnson is obvious. How reliable was the testimony:

As pointed out in the defendant's affidavit in support of the motion to compel psychiatric examination, in 1979, a psychiatrist had evaluated Bobby Roberson and in March of 1983 the New Mexico Probation and Parole Division made a report on Roberson's progress. The psychiatrist described Roberson as a manipulative person

who seeks "in a rather dramatic way of placing himself on center stage" and who has "faked" situations to achieve personal satisfaction. The New Mexico report indicates that Roberson has "encountered many serious behavioral problems in "working" with staff and that he "appears to be an extremely volatile and manipulative person". Both the psychiatrist's evaluation and the New Mexico report note Roberson's memory-lapse problem and his inability to recall events for which he was incarcerated. The psychiatrist's report also notes that when pushed, Roberson admitted that he could remember more than he stated at times. Roberson had a history of behavioral problems, manipulativeness, and desire for center stage. Given this background, his involvement in this case was very suspicious. He sought out a detective to inform him of the defendant's jailhouse conversations – conversations which were completely innocent to that point. After speaking to the detective and returning to his cell, Roberson was suddenly (within one day) allegedly privy to a full, complete, and very detailed confession by the defendant during which the defendant even allegedly drew Roberson a map to detail the route of abduction. (Tr. 830)

To maintain validity as truth-seeking bodies, courts must integrate mode in scientific methods for evaluating a person's capacity to tell the truth. A psychiatric evaluation can often help bring the truth to light, and courts are beginning to recognize the value of such evaluations. *State v. Armstrong*, 232 N.C. 727, 62 S.E.2d 50 (1950).

Because psychiatric evaluation is relatively new in the law, cases on the subject are not plentiful. However, certain concepts are clear. Even if a person is found

competent to testify at trial, he is still subject to an attack on his credibility based upon his mental state or capacity. *People v. Schuemann*, 548 P.2d 911, 913 (1976). The value of this rule was pointed out by a commentator who stated that, 'Actually, the psychopathic liar may be so convincing that he may pass the test of competency with flying colors.' Conrad, 'Psychiatric Lie Detection', 21 F.R.D. 199 (1957). In the present case, Roberson was probably competent to testify but his credibility was very doubtful.

The types of mental problems which will constitute an attack on credibility, and thus be relevant, have varied in the decisions. In one case, a chief witness had been involved in an incident in which he ran around the city naked. The court excluded psychiatric evidence regarding the incident because not enough facts were alleged to show that the witness might suffer from 'some mental aberration rendering his observation and memory of [the events] unreliable'. *Bakken v. State*, 489 P.2d 120, 124. The witness's capacity to remember a universally accepted as a method of attacking credibility. The psychiatric evaluation and probation report done on Roberson specifically and particularly addressed his lapse in memory and inability to recall the events of the crimes he committed.

The defendant urges this Court to follow the approach of allowing an attack on the witness' mental condition to show not only poor memory or perception but also to show that defendant has a motivation reason, tendency or predisposition to lie. The rationale for this approach seems clear:

> Lie detection is still an aboriginal state. The liar, be he a conscious or unconscious one, be he a normal person or be he a psychopathic liar, is as dangerous

> to our society as a murderer. No one method of lie detection is adequate. Many individuals still believe that a liar may be detected by the act of wiping his hands during the course of his testimony. Such lay rules of thumb offer few possibilities in lie detection. Conrad, Psychiatric Lie Detection, 21 F.R.D. 199 (1957).

The defendant urges this Court to follow the approach taken in *State v. Zuck*, 658 P.2d 162 (1982), and direct that evidence as to mental condition as it may effect credibility or capacity to observe, remember, understand, or comprehend.

The defendant urges that especially in a case in which the defendant is being convicted almost entirely on the testimony of one person. That person's mental condition should be a major, not collateral, issue in the case. *People v. Schuemann, supra,* at 914. In *Schuemann,* testimony of a psychiatrist was excluded because the trial court felt that mental disabilities defy precise definition and evaluation and because another psychiatrist's testimony was in conflict and the jury might be confused and distracted. The court, in reversing, said that wide latitude should be granted to the defense to attack the witness in a case which turns on the testimony of one person.

In the case of *State v. Allen,* 70 N.J. 474, 361 A.2d 5 (1976), the defendant was charged with armed robbery and murder. His key defense witness was a juvenile who was prepared to present alibi testimony. The juvenile had been at the state home for girls and was on parole. She had had psychiatric exams while at the home and had at times suffered from psychiatric delusions. The state moved to review her records and to require a psychiatric examination prior to her testifying. The court determined

that the prosecution should be permitted to examine the confidential records and utilize them on cross examination, if warranted, and to use them in applying for a court ordered examination. The New Jersey Court was interested, not in traditional key-note type responses, to the problems of credibility, but in helping the finders of the fact get the best possible look at the credibility of key witnesses in a criminal trial. The New Jersey court reached the same conclusion in *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958). See also, in support of the defendant's contention that the trial court should have held a hearing on Roberson's credibility and the question of whether a psychiatric examination was needed, *People v. Keelin*, 565 P.2d 957 (Colo.App. 1977); *McNeely v. State*, 349 N.E.2d 204 (Ind.App. 1976); *Mangrum v. State*, 299 S.W.2d 80 (Ark. S. Ct. 1957); and *Taborsky v. State*, 116 A.2d 433 (Conn. Sup. Ct. 1955).

With the glowing problems in the background of Roberson relating to his ability to tell the truth, and his propensity to manipulate facts to his own benefit, the trial Court should have permitted an examination of the witness. The defendant's life was on the line at the trial, and the trial judge did nothing to assure that the jury had all the information before it relevant to the question of whether the witnesses was telling he truth. The jury is the absolute judge of the matter of credibility of witnesses, and is so told in the instructions. Why the reluctance on the part of the trial judge to let the jury, then, have all the relevant information in order to make that most important of all decisions. The failure of the trial judge to trust the ability of the jury to assess the relevant information as

to the witness's credibility amounted to an abuse of discretion which contributed to the defendant's facing of death.

Appellant's Brief, pp. 46-51.

While a prosecutor's obligation to his office and to the people is to do just that which the title implies – prosecute – at the same time an obligation also remains on him to be fair in his search for the truth and his endeavor to bring no witnesses to testify to a jury who are in any way unreliable. A good and fair prosecutor in my book is one who will not place a witness of doubtful qualifications on the stand without first using all available methods of ascertaining that his testimony will not be conjured fantasy. Here the prosecutor, not to his credit, was willing to have the jury hear the testimony of Roberson no matter what his problems were. Such conduct would certainly go far in gaining a conviction, but a prosecutor should always want to well satisfy himself that a tendered witness is a "valid witness." When the prosecutor fails to do that, then the Court should do it. This would be especially true where, as here, defense counsel has been able to provide the trial court with evidence which puts a witness, here Roberson, in any extremely suspect light.

If the witness is nevertheless going to be allowed to testify, defense counsel certainly should have the right to present to the jury any expert testimony on the witness's personality, powers of recollection, and all else that would shed light in the credibility of any witness. On the basis of having been persuaded to accept the authority set forth above in the defendant's brief, I am fortified in

having joined Justice Johnson. When one examines a recent case in point from California, which in turn relies upon a recent holding from the Supreme Court of the United States, Justice Johnson and I are both fortified to what I think would be an overwhelming extent:

> Defendants rely principally on *Davis v. Alaska* (1974) 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347, to support their claim that the challenged discovery and evidentiary rulings effectively denied them their Sixth Amendment confrontation rights. In *Davis*, the prosecution obtained a protective order preventing the defense from cross-examining the key prosecution witness concerning his probation status. The order was based on an Alaska statute protecting the anonymity of juvenile offenders. Reversing the conviction, the United States Supreme Court held that the right of confrontation was paramount to the state's policy of protecting anonymity of the juvenile offender. Whatever temporary embarrassment might result to the witness and his family by disclosure of his juvenile record was outweighed by the defendant's 'right to probe into the influence of possible bias in the testimony of a crucial identification witness.' (*Id.*, 415 U.S. at p. 319, 94 S.Ct. at 39 L.Ed.2d at p. 355.) The high court reasoned that the Sixth Amendment guarantee that an accused in a criminal prosecution "be confronted with the witnesses against him" means more than confronting the witnesses physically. The primary right secured by confrontation is cross-examination. (*Id.*, 415 U.S. at p. 315, 94 S. Ct. at p. 1110, 39 L.Ed.2d at p. 353.) 'Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach,

> i.e., discredit the witness.' (*Id.*, 415 U.S. at p. 316, 94 S. Ct. at p. 1110, 39 L.Ed.2d at p. 353.) 'While counsel was permitted to ask the witness whether he was biased, counsel was unable to make a record from which to argue why the witness might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.' (*Id.*, 415 U.S. at p. 318, 94 S. Ct. at p. 1110, 39 L.Ed.2d at p. 355; emphasis in original.)

People v. Reber, 177 Cal. App.2d at 53, 223 Cal. Rptr. at 144.

The trial judge's decision to let Roberson testify under the circumstances here presented, as well detailed in the excerpt from defendant's brief is absolutely frightening. But worse is an appellate court decision which upholds that ruling, and in doing so establishes precedential case law binding in all future trials where cell mate testimony is offered.

This defendant may be guilty, true, but every man and woman in Idaho must now realize that they can be tried and convicted on testimony of a tainted cell mate, which is wrong, but worse yet when that inmate's mental balance has been recently held highly doubtful by other authority, but in Idaho will not become the subject of any inquiry whatever. It is indeed a violation of the right of confrontation, as per *Davis*.

II B THE CHILTON TESTIMONY

It would seem that if Chilton's attorney, and thus Chilton's agent and spokesperson, passed on to the prosecutor the remarks which Chilton allegedly had heard Fain say, then it has to be assumed that the attorney believed himself authorized to do so, and also thought

that it was in Chilton's best interest. The only way that this could benefit Chilton would be the expectation of an ultimate reward at the hands of the prosecutor for his volunteered "cooperation" with authorities by furnishing testimony at trial.

Thus, at the outset, there is little distinction between Roberson's direct contact with the prosecutor as compared to Chilton's vicarious contact through his attorney, after which Chilton stated that he was then visited (presumably) in his jail cell and asked to give up possession of excerpts from his journal which he kept. Thereafter Chilton "filed a formal statement" (where is not explained nor can I find an answer by examining the appeal record) "asserting that the prosecutor's office had conspired to force him into testifying, . . . " and that "Chilton continues to assert that the alleged death threats against him were, in fact, made by officials in the Canyon County Prosecutor's Office."

It surprises me that the entire Court does not find these underlying circumstances relating to Chilton's testimony very disturbing, extremely so. One point which I think is worth adding is that at the suppression hearing held before Chilton was allowed to testify to the jury, the court asked Chilton if he would say that no one ever offered him any money, leniency, or anything to get into Fain's cell and get information and turn it over to the state. Chilton's answer was that no one ever said anything like that at all. The question which the court did not ask him, however, was whether he expected any such favors. The whole scenario suggests that he did – otherwise it makes no sense. There is no problem whatever in believing that Chilton was cunning enough not to directly

ask for and that the officers for certain knew better than to volunteer any such offers or promises.

There is a large problem in understanding how the prosecutor, without calling himself as a state's witness, could make this testimonial statement to the court:

> MR. HARRIS: The only other thing I can say, Your Honor, is that as far as I know, in talking to Mr. Chilton, the statements what were given to him, or made to him that will be used in his testimony, were made voluntarily, not the subject of any interrogation of any kind on his part, but were spontaneous and voluntary remarks made by the defendant to Chilton himself in this case, or within his hearing. Actually, let's put it that way, within his hearing. Not made directly to him, but within his hearing.

Tr., Vol. IV, p. 843. Adding to that concern is the prosecutor's quickness in correcting himself where, after speaking of Fain's "spontaneous and voluntary remarks made by the defendant to Chilton himself . . . " he added, "or within his hearing. Actually let's put it that way, within his hearing. Not made directly to him, but within his hearing." Tr., Vol. IV, p. 843.

After the court ruled that Chilton could testify, the prosecutor interrogated both as to Fain-Chilton conversations and an overheard conversation between Fain and a Ray Beam who had apparently been introduced into the cell which was first occupied by Fain alone when Chilton was put into it. Chilton gave testimony which if believable, and believed, would have justified any jury in finding defendant guilty.

On cross-examination, however, Chilton was questioned by defense counsel. He gave some testimony which was more than of passing interest:

Q By Mr. Bishop: Have you ever stated that the prosecutor's office has conspired to kill you?

A [Chilton] Yes, I have.

Q When did you say that?

A I said it in court in my –

Q What – which court?

A Magistrate Court.

MR. HARRIS: Well, I am going to object as being irrelevant, immaterial, and not within the issues –

COURT: I don't quite see the relevancy of this –

MR. HARRIS: – of any issue in this case, Your Honor.

MR. BISHOP: Well, it goes to the credibility of the witness, I think.

COURT: Very well, I'll – I'll permit it.

Q Which court did you state that in?

A It was in magistrate court, my arraignment for cases C-5569 and 5568.

Q Were you represented by counsel at that time?

A No, I was not.

Q Was there truth to those allegations?

A Yes, there is.

Q Was that made in response to this testimony here today?

A No, it's not.

MR. BISHOP: I have no further questions, Your Honor.

Tr., Vol. IV, p. 854-55. The prosecutor, notwithstanding his objection to that sworn testimony, then took the witness briefly for the purpose of having Chilton further vouch for the verity of his testimony:

BY MR. HARRIS: Q Mr. Chilton, is the testimony that you have given here today true and correct to the best of your knowledge and belief?

A Yes, it is.

MR. HARRIS: I don't believe I have anything further, Your Honor.

MR. BISHOP: I have nothing.

COURT: You may step down, sir.

Tr., Vol. IV., p. 855.

Two days later a deputy prosecutor was allowed to return Chilton to the stand to testify that on the charges against him there was no plea bargain arrangement entered into in exchange for his testimony against Fain, Tr., Vol VI, p. 1278, at which time Chilton mentioned having a letter to him from the prosecutor which he read: "It is my feeling that Ricky should cooperate with us of his own violation [sic], volition as a demonstration of good will. *Id.*, at 1279.

Intimidation of a witness in a criminal case is a felony in Idaho. With the prosecutor in essence having endorsed Chilton's trial testimony, and that testimony including the statement that he, Chilton, was coerced and forced into testifying for the prosecutor, it was rather

hollow for Chilton to say as he did when called back that his testimony at trial was offered freely and voluntarily.

In these many years in this profession, I have never before seen the equal of these circumstances, and would hope to never see them again. Where a witness has testified to being intimidated into testifying by state officers, there is no way to rehabilitate him as to make him a palatable witness in a jury trial. From reading and rereading of his testimony Chilton comes across as a person who would and did say anything – and nothing in the record refutes his sworn testimony that he was intimidated by the authorities in a manner made felonious by law.

I cannot in good conscience concur in Part II of Justice Huntley's opinion dealing with the use of Chilton's testimony which I would characterize as an insult to the criminal justice system.

The philosophical question presented to us, as worded long ago by Justice Frankfurter, is whether the government's conduct in this case was such as to "offend those canons of decency and fairness which express the notions of justice of English-speaking Peoples," to "shock the conscience," and to "offend a sense of justice." *Rochin v. California*, 342 U.S. 165, 72 3. Ct. 205 (1952). Twenty-one years later the Supreme Court of the United States in an entrapment case in a drug context, *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637 (1973), citing to *Rochin* warned that:

> . . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial

> processes to obtain a conviction. . . . 411 U.S. at 431-432, 93 S. Ct. at 1643.

A five-justice majority went on to add that Russell would not be so fortunate. But a reputable four-justice minority (Justices Douglas, Brennan, Stewart, and Marshall) disagreed in two strong dissenting opinions.

III

Without citation to any case precedent, the majority rules that there was no error on the part of the trial court in not allowing the jury to have the tapes, and also a transcript of the tapes. Neatly finessing a rather sticky issue, the majority provides the trial bench and bar with the pontifical pronouncement that "limited, relevant portions would have been admissible under the then existing Idaho evidentiary practice, which practice is now articulated in Idaho Rule of Evidence 106." Rule 106 is then set out following which is conceded that the State did not introduce a writing (which, or a recorded statement, is the subject matter of Rule 106).

Grossly putting the blame for the non-admission of the tape and transcript on the public defender, the majority indulge in a bit of sophistry, which, while it reads nicely, is simply an unsupported statement: " . . . since Fain's counsel failed to tailor his request in any respect so as to move for the admission of only those other parts of his statement which might be relevant to the context of Officer Newton's testimony, the trial court committed no error in refusing the full transcript of the taped interview or the tapes themselves." Majority Slip Op. p. 6.

This language is not only extremely unfair to defense counsel, but the majority has seized upon the incorrect rule. Not only that, but the majority declines to inform its readers that the witness, Officer Newton, came to court with a complete transcript in his hands, and at some stages of giving testimony resorted to it. In *State v. Johnson*, 92 Idaho 533, 417 P.2d 10 (1968), in finding error, this Court recited "the then existing Idaho practice" with which in my practice I had many experiences. First of all, the true principle was learned in law school, and secondly it had been reduced to a written rule which is set out in the *Johnson* case:

> A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution. I.C. § 9-1204.

State v. Johnson, supra, at 537.

Idaho Rule of Evidence 612 is much like the earlier § 9-1204. Rule 612 is readily available in the volume of court rules. As pertinent here, it provides that where a witness, while testifying, uses a writing or object to refresh his memory, or, where a witness before testifying uses a writing or object to refresh his memory, the adverse party (here the defendant Fain) is entitled to inspect it, to cross-examine the witness thereon, and to

introduce in evidence those portions which relate co the testimony of the witness. This tape's only content was the entire interrogation as to Fain's activities at times pertinent.

That same rule requires of the party propounding the witness whose recollection has been thus refreshed to make "claims that the writing or object contains matters not related to the subject matter of the witness's testimony." Where such claim is made, the same rule provides that "the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to party entitled thereto."

In the instant case there was no such claim made by the prosecution. The majority, after having "most carefully reviewed the record," (Majority Slip Op. p. 28) has not informed itself of the provisions of this rule. Yet the majority has the gall to accuse the public defender of failing to tailor his request.

Because the trial court, on hearing the prosecutor's objection to the tape (an object) or the tape transcript (a writing) being received in evidence, failed to have the reporter record the argument on the objection (the jury having been excused), we do not know the grounds upon which the prosecutor argued. The prosecutor asked to approach the bench, the jury was taken out, the court invited both counsel to "come up" and the arguments were had. Tr., p. 648. But not taken by the reporter. A recess was taken. When proceedings resumed, the court stated that the ruling on the admissibility was reserved, but that cross-examination could proceed, "including that subject matter."

At this point there was further argument of counsel which was taken by the reporter, during which defense counsel stated:

> Officer Newton, through examination by prosecution, has given bits and pieces of the two-hour, two and a half-hour interview, and the entire statement at this point is relevant to the jury, and the tape is the best evidence of the conversation, and not the recollection of Mr. Newton at this point.
>
> The tape is available, and we ask that the entire conversation – the entire interview be admitted in fairness and due process requires that it be admitted.

Tr., Vol. III, p. 650. To this the Court responded, saying that he had never listened to the tape (not mentioning the transcript of the tape), but apparently the court put both in the same category, and added:

> But it is also evident to me that a conversation of that nature may contain questions and answers which are subject to proper objection.
>
> It may be redundant, and it may contain matters that – matters that are excluded under ordinary rules of evidence. Hearsay, and all kinds of things could be involved in that tape.
>
> It's my position that unless a cause or a basis, inconsistencies for some reason is shown by the evidence to justify the inclusion of the entire tape, that it would be premature for me to admit it all this time.

Clearly the trial judge, having not heard the tape, surmised and speculated into not complying with the Rules of Evidence. Tr., Vol. III, p. 651. What happened when the trial judge was again confronted with making a ruling is best presented by going again to pertinent statements of counsel and the court. First, defense counsel began by refreshing the court's memory:

MR. BISHOP: Okay, Exhibit A is a taped interview conducted by Officer Hensen and Officer Newton of the defendant Charles Fain on October 27th, 1981, I believe – 1982.

It has been testified to by Officer Newton. It has been referred to by Officer Hensen.

We have had pieces of the information, basically to refute the alibi, or where inconsistencies as to where Charles was during the period December, January, February, and March of 1981 and '82.

On cross examination the –

Tr., Vol. V, p. 1217. The prosecutor objected to the admission, and the jury was excused.

Defense counsel continued:

A is the tape recording of the interview conducted on – I believe it was testified it was two and a half hours on October 27th.

Basically the officers testified as to what they considered inconsistencies in his statement with what we were to show here in court.

The – there's denials contained in it, and we know there is denials contained on it.

The prosecutor in his cross examination of Charles made reference to the transcript of that interview in attempting to impeach, or indicate recent fabrication of his testimony; and we feel in fairness, and under the law, that the jury, as the trier of fact, has the right to have all of the facts before it, and that those facts include not only the bits and pieces which have been referred to in that interview, but the entire interview.

The testimony has been that the transcript was prepared by a secretary. It was listened to, but it was never compared, and the best evidence is the tape recording itself.

It would also reflect the tone and the way in which the interview was conducted, and enable – in – in order to enable the jury to listen to the tape, and get the clearness of the tape, I would – as I know the Court has done previously – ask that the tape be played and that the jury each be – presented with a copy of the prepared transcript so that they can follow along and hear their own wording what took place.

I think that due process demands, and under the laws it demands that we have now had reference to that interview; that on – only parts of the interview had been placed into evidence, and it's only fair that the jury, as the trier of fact, hear it all, and let them be the determination of the credibility of all of the witnesses. Two primary witnesses, Mr. Hensen and Mr. Newton for the state, are on there, as well as Mr. Fain, and the jury has heard all of the testimony and the conflicts of the testimony between what parties have said versus where Mr. Fain was; and I believe that they're entitled to, or the defendant is entitled to – to have them hear the entire transcript – the entire interview that was conducted on the 27th, and based on that, we are asking that it be admitted.

Tr., Vol. V, p. 1219-21. At this point the prosecutor stated the nature of his objection:

MR. HARRIS: My objection, Your Honor, is goes to the hearsay declaration, and that's what it is, hearsay.

Secondly, its' accumulative. The defendant has testified. The jury has that on which they can base any decision that they care to make in this case.

It's accumulative in that the tape would overly emphasize whatever it is that counsel is arguing in the case, but it – but the hearsay part of it is . . . is perhaps the most cogent legal reason for its exclusion. It's obviously not under oath.

It's an out-of-court statement, and if put in for the truth of the matters at are . . . incorporated therein, and there are, I think, some things in there that are legally objectionable, and would have to be edited in any event if it were to go to the jury. And I think for those reasons, that we should

Counsel has – has had every opportunity to impeach the witnesses that have appeared for the state and testified from that tape recording, or transcription. Had every opportunity to do that, and it seems to me that the effect of what he is requesting the Court to do is to set aside the – the legal requirements of evidence so that he can shotgun anything he wants to the jury, and – and the rules of evidence, and for good reasons, do not allow that kind of evidence to be presented.

For those reasons we object.

Tr., Vol. V, p. 1221-22. Other less germane argument was made, after which the judge stated that he had not listened to the tape but gave his ruling:

In – in the first place, in my opinion, you have not established a proper foundation to introduce that tape into the record – into evidence, and you haven't made any argument or showing that that tape contains any evidence that is exculpatory as to the statement.

What you really want to do is – is add, or it's not really an addition. It's redundant is what it is. Is just go back through that, and have them – a jury deal with something that has never even been presented to the Court; and I –

I'm not going to permit it into evidence.

The people having testified, and their testimony is under oath here in court, and they were free to be cross examined and examined, and recused, and redirected, and as far as I'm concerned, that's the time to

> try your case, not by introducing tapes made outside the – when there is no showing of any – any basis that I can see in law for it – to admit that tape.
>
> That's my position on it.
>
> (Whereupon Defendant's Exhibit A, having been previously marked and offered, was refused.)[9]

Tr., Vol. V, p. 1225-26.

The basic issue presented, however, and really the $64,000 question to be answered, is that raised by the prosecution's success in swinging the court's thinking into the erroneous belief, and then ruling, that the defense counsel somehow had to establish the relevance of the entire tape. Where the rule reads just the opposite and it was the prosecution who utilized the tape and the transcript thereof as the basis for the testimony of officer Newton, it was incumbent for the prosecutor to show the irrelevance. It is difficult to conceive of any more prejudicial error that took place. The officers called defendant in for the interview; the officers arranged for the machine which would record the interview on a cassette tape; and they caused a transcript to be made. Officer Newton had the tape and the transcript present when he testified on behalf of the prosecution. The prosecution obviously believed that the taped interview and transcript thereof were essential to making a case against the defendant. Then, and exactly as defense counsel explained to the

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[9] Similarly, the trial court ruled out Defendant's Exhibit C, a 10 to 20 minute audio-video tape at the time Fain was placed under arrest. On the prosecution's objection, the court ruled that "the object that it's hearsay and inadmissible for that purpose is also well taken – it's not admissible into evidence . . . "

court, Officer Newton, in response to the prosecutor's questions, gave selective answers based on his recollection of what had been said by the defendant. Great trouble is experienced in understanding how the trial court allowed itself to be misled. Much greater trouble is encountered in comprehending how the majority, and why the majority, misportrays this important aspect of the case. This was a critical issue. The prosecution interviewed the defendant for two and one-half hours, two of them doing so, and having in their grasp an intellect so diminished – if one is willing to believe Chilton and Roberson – that he would readily detail his criminal activity to two strangers neither of whom he had ever seen before.

The two interrogating officers admitted that they could not exact a confession out of the defendant. Apparently the prosecutor thought their testimony important for use at trial in exploring any inconsistencies arising out of the long interrogation.

Clearly there was error in not allowing the jury to have all of the evidence which the tape and/or transcript would provide not just selected items at the prosecution's option.

In *State v. Sivak*, 105 Idaho 900, 674, P.2d 396 (1983), the court at sentencing received in evidence and utilized a tape, and typed transcript thereof, of an interview of Sivak's co-defendant, Bainbridge, notwithstanding that it was blatantly rank unsworn hearsay. *Sivak, supra*, at 917, 674 P.2d at 413. No direct mention of this was made in the majority opinion authored by Justice Bakes. Justice Bakes

buried that aspect of the highly unusual procedure in this manner:

> The findings of the trial judge in sentencing are based not only on what he has heard during the trial, but also on the information he gathers from many other sources. A trial court's duty to tailor a sentence to an individual defendant necessitates access to a wide range of information about that defendant. *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980). This is especially true in cases involving the possible imposition of the death penalty, wherein the United States Supreme Court requires that the sentence be determined according to the requirements of each individual case. *See Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The trial judge in the present case received an abundance of information during the sentencing portion of defendant's trial concerning the character of the defendant and his possible inclination. The trial judge thus issued his findings based on his access to this broad range of information.

105 Idaho at 907, 674 P.2d at 404.

Today, although the trial court error in regard to non-admission of the tape and transcript thereof is contextually different from the error in *Sivak* in admitting and utilizing the tape and transcript, both are equally egregious in unfairness and prejudice. Utterly incredible is the rationale by which the trial judge in the instant case could allow the officer to testify as to what defendant Fain said at the taped interview, and then rule the tape and transcript inadmissible as being hearsay.

That ruling, now affirmed by today's majority, should result in the rules of evidence being rewritten. The majority, instead of referring to the "then-Idaho evidentiary practice" and mistakenly declaring it the equivalent

of an evidence rule promulgated after the defendant's trial, better would have contented itself with the applicable rule of evidence which was in effect. Any mention of Rule 106 should have been avoided.

Both the tape and the transcript thereof should have been admitted in evidence. It was indeed a question of best evidence, as defense counsel argued. The best evidence of what an interviewed accused has said, and the questions to which he is responding, is not recollections of the officer or officers who conducted the interrogation. It is difficult to conceive of any part of the tape which would not be relevant.

IV

I do not disagree with Justice Huntley's general discussion on polygraph examinations and use thereof at trial. Note should be taken, however, that as to the many cases cited by him, he does not point to any single one as being illustrative of the particular context in which the issue arose in this case.

As suspect, in this case, Fain, is detained and asked by the authorities if he will volunteer to submit to such an examination and is given no promise that it will not be used against him. In fact, there is every reason for him, and the authorities, to expect that if adverse to his circumstances, it will be used against him.

My understanding of fair play requires that: (1) He be allowed to tell the jury that he volunteered to take the test; (2) That the jury be allowed to know the results of the test; (3) That both the authorities and the defendant

be allowed to examine the polygraph examiner; and (4) That the court instruct the jury as to the use which can be made of these requirements, which would not be that it is by any means conclusive.

It is simply wrong, albeit not illegal, to ask a person to submit to such testing, and where he agrees to do so, then deprive him of letting the jury know that he has done so. Justice Huntley has written that the results are inadmissible absent a stipulation of both parties. Question: Is not the law enforcement authority requesting that a defendant/accused/suspect take the test implicitly so agreeing? If not, then is he in good faith in so requesting? Where the accused agrees to take the test, and exacts from the authority no agreement that it cannot be used against him, too, is not he so agreeing?

In the long-run police work will be made easier by a ruling which encourages suspects to be examined. A suspect who passes the test more often that not is not a viable suspect, and the officers can devote their time investigating others. One wonders at the wide-spread use of polygraph testing in government and business circles, if it serves no valid purpose.

V

I concur with what Justice Johnson has written, adding only that it is the state authorities who most often profit by such testing as was done here. For many, many years now anyone connected with law enforcement has known this to be so. One can only surmise that from the top echelon of law enforcement down, somewhere along the line law enforcement was not adequately informed

and instructed as to procedures to be followed. It makes no sense for anyone to put the blame on the doctor who, after all, was under the direction of the officer.

The majority opinion painstakingly reviews pages and pages of cases from other jurisdictions in discussing the problem with the disposed evidence, culminating with the conclusion that: "[t]he remedy of retrial, rather than dismissal, was also found appropriate in *Commonwealth v. Chapman*, 386 A.2d 994 (Pa. 1978)." Slip Op. at 27. At this point it appeared that the opinion was about to climax with a Rule of Law. Not so, however. Instead, in what will be seen as an outstanding *ipse dixit*, the majority opinion states: *"[b]ased on the foregoing analysis*, we have determined that the State did not deprive the defendant of due process by failing to preserve the semen samples it had obtained." *Id.* at 27. Hopefully some astute member of the trial bench or bar, or a legal scholar will in time explain to me what exactly was the analysis.

The majority opinion then proceeds to accept, utilize, and emphasize the weight of the testimony of the two cell mates which is strangely included with the pubic hair similarity and a witness description of the car the victim was last seen riding, after which it is "concluded that although the evidence against Fain is circumstantial, it is nonetheless significant and weighty." This seemingly is meant to serve as a predicate for the ensuing sentence which states that "dismissal would be an overly severe sanction." (Majority Slip Op., p. 28). No one on this Court to my knowledge has ever considered dismissal.

Having thus ruled out dismissal of the case, the majority opinion astounds me, and I am certain also the

trial bar, that a "most carefully reviewed . . . record" results in the conclusion that if there were a retrial "there is no likelihood that the result would be changed." In that summary manner the majority abolish this defendant's right to a jury trial free of error.

I agree that due process does not demand that the charges be dismissed. But a new trial is warranted, as in *Chapman, supra,* the precedent upon which the majority relies.

A new trial would serve no purpose, so says the majority, because "there is no likelihood that the result would be changed." *Id.* at 28. This usurpation of the jury's role is troubling, considering that there is no direct evidence in the record upon which a conviction could lie. Under the circumstances here the words "circumstantial evidence" and "overwhelming" are oxymoronic. Thus, I concur with Justice Johnson's view that due process mandates a new trial, whereupon Fain's requested instruction,[10] be given to the jury. As one commentator has stated:

> We must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.[11]

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[10] Find in Justice Johnson's dissent and concurrence at 56.

[11] Hughes, "Duties to Trespassers: A Comparative Survey and Revaluation," 68 Yale L.J. at 700 (1959).

VI

Contrary to the conclusion of the majority, the I.C. § 1925(g)(5) and (6) aggravating circumstances are duplicative.[12] *Every* murderer who exhibits "utter disregard for human life" commits a crime which is "especially heinous, atrocious or cruel manifesting exceptional depravity." Today, however, the majority in concludes that the aggravating factors describe two "quite *different* kinds of culpability." The majority states:

> The particularly cold-blooded killer *need not* act sadistically or in particularly *outrageous fashion* in order to commit a killing with *utter disregard for human life*. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.

Slip Op. at 32 (emphasis added).

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[12] I.C. § 19-25-25(g) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.
>
> . . . .
>
> (5) The murder was *especially heinous, atrocious or cruel, manifesting exceptional depravity.*
>
> (6) By the murder or circumstances surrounding its commission, the defendant *exhibited utter disregard for human life.*

(Emphasis added.)

Thus, according to the majority, a "cold-blooded killer *need not*" act in an "outrageous fashion" to commit a murder "with utter disregard for human life." I cannot fathom a first degree murder which is not carried out in an "outrageous fashion." Every premeditated murder is outrageous.

The (g)(5) and (6) subsections are nothing more than kitchen sink aggravating circumstances which enable the state to make *every* first degree murderer not just a candidate for, but an actual recipient of, the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

VII

I am unable to agree with Part VII. In addition to what was written in my prefatory remarks and elsewhere in my opinion, I think that the mandatory review cannot and should not be delayed.

Appendix A attached to the Opinion of the Idaho Supreme Court was related to an issue not raised here and has been omitted.

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent, v. CHARLES I. FAIN, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING NO. 15414 Ref. No. 89RH-23

The Respondent having filed a PETITION FOR REHEARING on April 25, 1989 and supporting BRIEF on May 17, 1989 of the Court's Opinion released April 4, 1989; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 30th day of May, 1989.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Jim R. Doolittle

EXCERPT FROM FAIN'S DIRECT APPEAL BRIEF

* * *

ARGUMENT

I. THE TRIAL JUDGE, BY INTERPRETING THE DEATH PENALTY AS BEING MANDATORY IN NATURE, BY IGNORING OR DISREGARDING MITIGATING EVIDENCE, BY DISPROPORTIONATELY APPLYING THE DEATH PENALTY BECAUSE OF HIS BELIEF NOW THAT THE STATUTE IS MANDATORY, AND BY IMPOSING THE DEATH PENALTY IN THIS CASE, DEPRIVED THE DEFENDANT OF HIS MOST PRECIOUS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

After hearing evidence at the sentencing hearing, Judge Doolittle found two mitigating factors in behalf of the defendant, and found two statutory aggravating factors. (R. ___) He did not then exercise his discretion in determining whether to impose life or death, but rather considered himself bound to impose the death penalty by what he reads to be a mandatory death penalty statute. As the judge stated in his Findings:

> "The reason the death penalty was imposed on the First Degree Murder conviction is because *this Court believes that section 19-2515, Idaho Code, is mandatory* in its language requiring the infliction of the death penalty *unless the trial Court finds that the mitigating factors outweigh the aggravating factors,* thereby making the imposition of death unjust.
>
> The Court does not believe that the mitigating factors outweigh the aggravating factors in this case.

> The death penalty was also imposed for the conviction of First Degree Kidnapping because *the Court believes that the language of section 18-4504, Idaho Code, is also mandatory* where the victim was murdered unless mitigation factors outweigh aggravating factors under section 18-4505, Idaho Code. As aforesaid, the Court does not believe this to be the case." (Emphasis added; R.)

In reading and applying the penalty statutes in such mandatory fashion, the Court applied a statute unconstitutionally under the very clear dictates of *Woodson v. North Carolina*, 428 U.S. 280, 49 L.ed. 2d. 944, 96 S.Ct. 2978 (1976) In so reading and applying the death penalty provisions, the Court fell into the trap created by the marshy vagueness of those statutes, i.e., the trap which two members of this Court have consistently warned about in recent months.

The United States Supreme Court decision in *Woodson, supra*, points out that the severity of the common law rule of mandatory death sentences caused many jurisdictions to escape that severity by narrowing the definition of capital homicide. Then, that approach being found insufficient, discretionary sentencing was subsequently substituted for mandatory death sentences.

The 19th century movement away from mandatory death sentences was rooted in the recognition that "individual culpability is not always measured by the category of crime committed. Procedures must safeguard against the arbitrary and capricious imposition of death sentences." *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001 (1976).

In *Woodson v. North Carolina, supra,* the United States Supreme Court unhesitatingly concluded that a mandatory death penalty statute was unconstitutional as being inconsistent with contemporary standards rejecting automatic imposition of the death sentence upon every person convicted of a specified offense.

In 1983, the Supreme Court of Louisiana vacated a defendant's death sentence because the trial judge instructed the jury that if it found that the state had established at least one aggravating circumstance, it was "obligated to return a sentencing recommendation of death." The Court held that this instruction deprived the jury of the constitutionally required degree of sentencing discretion. *State v. Brogdon,* 426 So. 2d. 158 (La. 1983).

And, in its most recent decision concerning the death penalty issue, the United States Supreme Court again reiterates its unswerving opposition to mandatory death penalty provisions:

> Even though the deterrence rationale may provide a basis for identifying the defendants eligible for the death penalty, the United States Supreme Court cases establish that the decision whether to condemn a man to death in a given case may not be the product of deterrence considerations alone. Despite the fact that a legislature may rationally conclude that mandatory capital punishment will have a deterrent effect for a given class of aggravated crimes significantly greater than would discretionary capital sentencing, *we have invalidated mandatory capital punishment statutes,* as well as statutes that do not permit the trier of fact to consider any mitigating circumstances, even if unrelated to or perhaps inconsistent with the deterrent purposes of the penalty. It is now well-settled that the trier of fact in a capital case must be permitted to weigh any consideration – indeed

> any aspect of the defendant's crime or character – relevant to the question whether death is an excessive punishment for the offense. Thus, particular capital sentencing decisions cannot rest entirely on deterrent considerations." *Spaziano v. Florida*, S.Ct., slip #83-5596, 1984.

A capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

This means that if a State wishes to authorize capital punishment it has a constitutional obligation to tailor and apply its law in a manner that avoids arbitrary or mandatory infliction of the death penalty. Part of the State's responsibility in this regard is to define capital crimes in a way that obviates "standardless sentencing discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that make rationally reviewable the process of ordering a human to die. *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398, 1005 S.Ct. 1759 (1980).

To its credit, the Idaho legislature has at least made a vague attempt to provide the sentencing judge with the tool of discretion. While the defendant believes that the attempt has failed because of vagueness and because it deprives him of the right to have a jury determine whether death should be imposed, he does point out that the trial judge in this case did not even follow that discretion provided him. Not only in the statute, but in all of Idaho case law, is it the rule that discretion must be exercised in pronouncing sentence. The Idaho courts have

made it clear that sentencing is within the sound discretion of the trial judge, with the purpose stated of imposing the minimum sentence necessary to accomplish the primary goal of protecting society and the related goals of deterrence, rehabilitation, retribution and punishment. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

In the instant case, the trial judge exercised no discretion. Instead, he applied a presumption of mandatory death *unless* the defendant could show that mitigating factors outweighed aggravating factors. He thus put upon the defendant the burden of overcoming a mandatory imposition of death upon conviction for first degree murder and kidnapping. As in *Woodson*, and *Brogdon*, both *supra*, the presumption, and the resulting burden, violates the United States Constitution.

The Trial judge also committed painfully reversible error when he placed the burden on the defendant of showing that the mitigating factors outweighed the aggravating factors, and then did not even consider in his Findings much evidence that was introduced in mitigation.

Implicit in all the decisions of the United States Supreme Court in recent years is the concept that the defendant must not shoulder the burden of showing that he should *not* be given death. That is the crux of the striking down of mandatory penalty provisions. It is also clear from the movement in the United States Supreme Court and in this Court away from presumptions which shift the burden of proof on any material matter in a criminal case to the defense. See *In Re Winship*, 397 U.S.

358 (1970). Yet, the trial judge here states that death is imminent unless the aggravating factors are outweighed by the mitigating factors. What standard of proof did he apply to determine that the necessary weight was not present? He does not say, and the members of this Court do not know. Neither does the defendant. That is not the process which is due under our Constitutions. In *State v. Wood*, 648 P.2d 71 (Utah, 1982), the Court reversed imposition of a death penalty where the trial judge had stated that death should be imposed even though there was reasonable doubt as to whether aggravating factors outweighed mitigating factors. The Utah Court concluded that the sentencing authority must be convinced beyond a reasonable doubt that death should be ordered before the extreme penalty can be applied.

Here, not only did the trial judge unnecessarily and unlawfully shift a burden of proof to the defendant, he also did so without ever indicating what standard of proof he would use to determine whether the burden was met.

The trial judge in this case has misinterpreted the role given him by Idaho Code, section 19-2515, in considering mitigating circumstances. It is only through the proper analysis and application of the evidence concerning such circumstances that a court can possibly constitutionally determine whether to order that a person die. In order to properly apply and meet the terms of section 19-2515(d), the trial court must not overlook or ignore any mitigating evidence which is presented to him. In this case, the Court decided that the mitigating factors which he found to exist: no previous crime of violence, and honorable service in the Military, did not outweigh

the aggravating factors. But, he did not advise this Court, or, perhaps more importantly, the defendant, as to why he ignored or discarded testimony as to other matters of mitigation such as: the defendant's successful recovery from addiction to alcohol (a recovery such as is not often seen in the criminal court of Canyon County), the total lack of criminal behavior subsequent to his recovery from that addiction, the defendant's model behavior while incarcerated for an offense which he vehemently denied, his continuing claim of innocence, his family's continuing support and belief in his value as a human being, and the circumstantial nature of the evidence of guilt presented. All of these factors were present in the evidence, and all were urged strenuously by counsel for the defense, but the Court neither acknowledged them nor advised this Court why he ignored or disregarded them.

It is clear that the Idaho Code, as interpreted and applied in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), has made the trial judge, himself, responsible for determining what mitigating factors are. The statute sets forth aggravating factors, but does not set forth specific mitigating factors. Therefore, the trial court must consider and make findings as to all the evidence offered in mitigation. For, every defendant is entitled to have the trier of fact consider any relevant evidence. See *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Osborn*, this Court provided the guidelines by which the trial judge should consider mitigating circumstances, when it stated that such circumstances include, but are not limited to, the defendant's background, his age, his upbringing and environment, and any other matter appropriate to a determination of degree of culpability. In this case, the

trial judge neither stated why he ignored or disregarded the other mitigating circumstance in evidence, nor what standard he used in determining that the two mitigating factors which he found did not outweigh the aggravating factors, nor whether, if considered, the other mitigating circumstances could have pushed the weight of mitigation ahead of aggravation. No man should die without having the answers to these critically unanswered questions. This Court's attitude is indicated by its approval of the trial judge's actions in *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), where the court not only enumerated and considered each mitigating circumstance presented by the defense but then also considered other mitigating factors not addressed by the defense. The obvious implication from *Gibson* is that the judge should consider all relevant evidence as to mitigation, and then should document why that evidence is weighted or not. One of the reasons why the trial judge's actions here do violence to the Constitution is that, to an unspecified degree, the sentencing judge is obligated to make his decision on the basis, among others, or prediction regarding the convicted defendant's potential or lack of potential for rehabilitation. See *United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 610, 57 L.Ed. 2d. 582 (1978). Without considering all relevant evidence concerning mitigation, the trial judge is in no position to carry out this responsibility.

In this case, the trial judge again misinterpreted his role under the statute by initially announcing that he could think of no mitigating factors that would justify the death of a nine year old girl. (R. 1447)

Modern society has serious reservations that any motivation justifies the death of any individual. The

Court's role is not to try to justify the death of the victim, for nothing can justify that. Rather, the Court's role is to justify the death penalty by considering all the presented mitigating factors, and concluding which is better justified – life or death for the *defendant*. The acceptable and socially desirable outcome is life, with the exception being those who have demonstrated characteristics which are intolerable to society *and* who cannot demonstrate the capabilities of rehabilitation. Only these two considerations in tandem justify the death sentence, and make proportionality more attainable and meaningful.

The Idaho Supreme Court agrees that the most recent capital cases have relied on these two basic characteristics, to align each with the other capital cases in which the death penalty was imposed. *State v. Aragon*, S.Ct. #14771 (1984).

In the 12 years since *Furman v. Georgia*, 408 U.S. 238 (1972), every Member of the Supreme Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense committed by a given defendant. *Spaziano v. Florida*, S.Ct. slip #8305596 (1984).

By considering the death statute to be mandatory, the trial judge deprived himself of the capability of attempting to insure equally proportionate imposition of death. The problem of disproportionate or unequal imposition of the penalty most definitely reaches the status of an

equal protection violation in the instant case. Justice Bistline has pointed out the problem in *State v. McKinney*, S.Ct. #14551 (1984):

> "It is not easy to rationalize the sentence which was here imposed, as compared to the sentence in State v. LePage, 103 Idaho 839, 655 P.2d 46 (1982), both at the hands of the same district judge, who had before him defendants convicted of senseless and callous murders. Nor is it readily discernible that there is proportionality in the sentence meted out to McKinney, as compared to the lesser sentence awarded Dovey Small, also convicted of the same murder."

By imposing a mandatory death penalty, this trial judge reversed the interpretation of the law which he applied in the case of Melvin Dean Major, Canyon County case no. C-4631, a case previously reviewed by this Court. In that case, a particularly brutal and heinous cutting murder was committed, yet Judge Doolittle, applying sentencing discretion, imposed only a life sentence. The reason that the judge did not give death is that he believed the victim to be a drug supplier who had gotten involved in an unsuccessful drug deal with the murderer. The Judge, in the Findings which are attached to this brief as Exhibit A, concluded that a drug supplier runs the risk of violence, and that innocent persons could be protected by incarcerating the defendant for his life. If, in fact, the death penalty statute is mandatory, as Judge Doolittle now believes, then why did Major not receive the death penalty? A review of the Findings makes it clear that there were no over-weighting mitigating factors in favor of Major. By applying one statutory interpretation to Major, and another to the defendant here, the trial judge has deprived this defendant of the benefit of the

exercise of judicial discretion in considering the mitigation evidence. And, in so doing, he has deprived this defendant of the equal protection of the law which he is guaranteed by the Constitution. Surely, this Court cannot condone such inconsistent applications of the statute, with such tragically different results from the standpoint of the defendant in this case. The nature of the statute did not change between the Major sentencing and that of the defendant here. What changed is the judge's interpretation of the statute, and the differing interpretation may cost the defendant his life, unless this Court now requires the equal, proportional application of the law which is demanded by the Constitution. The punishment imposed should fit the offender, and not merely the crime. *Roberts v. United States*, 445 U.S. 552, 63 L.ed. 2d. 622 (1980). In order to make the type of qualitative judgment which is constitutionally required, the trial judge must apply the statute equally in all cases, and must consider and weigh all mitigating evidence presented.

The importance of a review of proportionality in the imposition of sentences of death is not just a concern expressed by the two Justices of this Court who have voiced their concern about the constitutionality of the Idaho death procedures. It has been expressed in very certain terms by the United States Supreme Court. In *Maggio v. Williams*, ___ U.S. ___, 104 S.Ct. 311 (November, 1983), the Court disagreed with the accused's argument that an appellate court should consider proportionality on a state-wide, rather than a district wide, basis. But the Court left no doubt that it is constitutionally necessary that an appellate court consider proportionality of death sentences, be it by district or state. There, the Court

points out that in *Autry v. Estelle*, 464 U.S. ___, 104 S.Ct. 24, 77 L.Ed. 2d. (1983), Mr. Justice White granted a stay in a case which raised the proportionality issue, and that the full Court refused to vacate the stay. In reaching its decision, the Court indicated its clear mandate that proportionality must be analyzed:

> "Our prior actions are ample evidence that we do not believe that the challenge to districtwide, rather than statewide, proportionality review is an issue warranting a grant of certiorari. Our view remains the same. Nor did Williams convince the lower courts that he might have been prejudiced by the Louisiana Supreme Court's decision to review only cases from the judicial district in which he was convicted. Indeed, the District Court examined every published opinion of the Louisiana Supreme Court affirming a death sentence and concluded that Williams' sentence was not disproportionate regardless whether the review was conducted on a district wide or state wide basis." (104 S.Ct. at 315)

In the instant case, the defendant optimistically points out that the District Court made no comparison of other death penalty cases, or other murder cases in the District, or on a state-wide basis. He could not have done so; he could not have compared this case with the *Major* case and still determined that the death penalty is mandatory. It is clear that the constitutional requirement of proportionality has not been met in this case – even if the District wide standard is used. As indicated in the next point of argument, there is no consistency or proportionality evidenced by the differing sentences which have been imposed in the Third Judicial District of Idaho.

1989 Opinion No. 44

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 16339 and 16741

THE STATE OF IDAHO, Plaintiff-Respondent.	Boise, November 1988 Term
v.	Filed: April 4, 1989
JAIMI DEAN CHARBONEAU, Defendant-Appellant,	Frederick C. Lyon, Clerk

Appeal from the district court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome. Honorable Phillip M. Becker, District Judge.

Review of death sentence and appeals from conviction of first degree murder and from denials of applications for post-conviction relief. *Conviction affirmed; sentence vacated; remanded for resentencing.*

Greg J. Fuller, of Jerome, Idaho, attorney for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, of Boise, Idaho, attorneys for respondent. Mr. Thomas argued.

JOHNSON, J.

This is a first degree murder case that comes to us for review of a death sentence pursuant to I.C. § 19-2827 and on appeal from the conviction and from denial of applications for post-conviction relief. We affirm the conviction

but vacate the sentence and remand the case to the trial court for resentencing.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS

Jaimi Dean Charboneau (Jaimi) was convicted of the first degree murder of his former wife, Marilyn Arbaugh (Marilyn). Jaimi was sentenced to death for this crime. The trial court twice denied post-conviction relief.

Jaimi and Marilyn lived together for approximately two years before they were married in June 1983. Marilyn had two teenage daughters, Tiffnie and Tira. The relationship between Jaimi and Marilyn was stormy. There is evidence that Jaimi physically abused Marilyn. In August 1983 Marilyn shot Jaimi with a .22 caliber pistol during a dispute. An aggravated battery charge was filed against Marilyn but was subsequently dismissed on the motion of the prosecuting attorney. In the spring of 1984 Marilyn filed for divorce. A default judgment was granted on June 13, 1984. There is evidence that Jaimi and Marilyn continued to see each other and were sometimes intimate after the divorce.

On June 21, 1984, Jaimi went to the cafe where Marilyn worked. They left in Marilyn's car. There is some dispute whether Marilyn went with Jaimi voluntarily. The next day Marilyn reported to the police that Jaimi had kidnapped and raped her and had stolen her car. There is evidence that Jaimi travelled to Nevada after June 21. The burned remains of Marilyn's car were found in southern Idaho in late June 1984. On June 25, 1984, Jaimi was

charged in Jerome County, Idaho with first degree kidnapping of Marilyn and grand theft of her car.

On June 28, 1984, Jaimi purchased a .22 caliber rifle from a hardware store in Gooding, Idaho. About midmorning on Sunday, July 1, 1984, Marilyn returned to her residence on a ranch near Jerome, after being gone since the evening before. Some time after 11:00 o'clock that morning Marilyn went out to check some horses in a corral near her home. Shortly after that Marilyn's daughter Tiffnie heard shots outside, grabbed Marilyn's .22 pistol, and went to see what had happened. She found her mother sitting on the ground in the barn with blood on her. Jaimi was standing close to Marilyn with a .22 caliber rifle pointed at Marilyn. Tiffnie asked Jaimi to leave and told him she was going to call the police. Jaimi told Tiffnie that he would take Marilyn to the doctor. Both Marilyn and Jaimi told Tiffnie to leave.

At 11:38 that morning Tiffnie called the Jerome County Sheriff's office and said that Jaimi had shot her mother. Tiffnie then told her sister Tira about the shooting, and they both got dressed. They heard more shots and ran outside where they hid behind a sheep wagon and called to their mother. Tiffnie had her mother's .22 caliber pistol with her, and it accidentally discharged behind her. She ran into the house, hid the gun, returned to the sheep wagon, and then ran to the barn. Tira followed close behind. Marilyn was lying on her back with her arms over her head. The girls ran back to call for an ambulance. At 11:42 a.m. Tira telephoned for assistance and reached the Jerome County Sheriff's office. She told them to get an ambulance and that her mother was dying. When the sheriff's deputies arrived at the scene, they

found Marilyn's body in the barn and located Jaimi in a field near the barn with a .22 caliber rifle lying nearby. Jaimi was arrested and charged with first degree murder. At the time of his arrest, Jaimi acknowledged that he had shot Marilyn, although he stated that he did so because she was going to shoot him.

The Jerome County public defender (the public defender) was appointed to represent Jaimi on the murder, kidnapping, and grand theft charges. Prior to a preliminary hearing on these charges, Jaimi's mother employed a private defense attorney (the defense attorney) to represent him. Following the preliminary hearing, Jaimi was bound over for trial on all three charges.

Jaimi told the defense attorney that he had not kidnapped or raped Marilyn and that he had not stolen her car. He stated that he and Marilyn had maintained a close and intimate relationship after their divorce, that she had been with him voluntarily on June 21 and 22, 1984, and that they had had consensual sexual intercourse on that occasion. He said that he had purchased the .22 caliber rifle as a present for Tira and on June 28, 1984, had taken it with him to the ranch where Marilyn and her daughters lived. He told the defense attorney that he and Marilyn had reconciled and were going to live together again, but that she wanted him to stay in the barn until she broke the news to her daughters. He said that he and Marilyn had sexual relations on the evening of June 30, 1984, and that she then left the ranch and did not return until the next morning.

Initially, Jaimi told the defense attorney that on the morning of July 1, 1984, Marilyn had taken the .22 caliber

rifle he had purchased for Tira into the house to remove a scope sight from it. He said that when she returned to the barn she loaded the rifle, pointed it at Jaimi, and pulled the trigger, but that it did not fire. Jaimi told the defense attorney that he grabbed the rifle from Marilyn and pulled the trigger several times while the rifle was on his hip and Marilyn was running away. He said that he closed his eyes while shooting. He said that after the shooting he took the rifle and fled to the nearby field.

Later, but prior to August 22, 1984, Jaimi told the defense attorney that after he fired the shots at Marilyn, instead of running directly out into the field, he had stayed around the end of the barn. He told the defense attorney that he heard Tiffnie talking to her mother and had looked around the corner. He said he saw Tiffnie holding a pistol in both hands pointed at Marilyn. Jaimi said that Tiffnie told Marilyn that Marilyn had screwed up their lives, ruined Tira's life, and was ruining Jaimi. He stated that he saw Tiffnie fire a shot from the pistol and saw Marilyn's hair fly up.

The defense attorney contends that based on this second version of the events of July 1, 1984, he tried to convince the prosecuting attorney to reinvestigate the crime. On August 23, 1984, he also discussed this version in a telephone conversation with his niece who was a psychic. Shortly after August 23, 1984, the defense attorney received a letter from his niece in which she reported having made contact with Marilyn through clairvoyance. The letter reported Marilyn's version of how she was killed. Among other things, the letter intimated that Marilyn's daughter had shot Marilyn after Jaimi had, because she couldn't stand to see her mother suffer.

The defense attorney was unable to convince the prosecuting attorney to dismiss the kidnapping and grand theft charges and to pursue the "second gun" theory. The defense attorney then filed a motion to dismiss the charges. At a hearing on this motion, the defense attorney called Jaimi to testify. The district judge carefully advised Jaimi that he could not be required to testify and gave the defense attorney an opportunity to explain fully to Jaimi his right to remain silent. Jaimi confirmed to the district judge that he understood that he had the right not to testify and that anything he said might be used as evidence against him. Jaimi was then sworn and testified.

In his testimony in support of the motion to dismiss Jaimi related fully the events concerning the alleged kidnapping and theft on June 21 and 22, 1984, as well as the events of July 1, 1984, surrounding Marilyn's death. He testified that when Marilyn came to the barn that morning she picked up the .22 caliber rifle and took it into the house to remove a scope sight that had come with it. He said that Marilyn told him that she was going to tell the girls that day that Jaimi was there and would let Tira take the gun to the gun range and let her sight it in. Jaimi told the court that when Marilyn came back to the barn she had a handful of bullets and loaded the rifle. He said that after going out to the corrals to move some horses, he and Marilyn returned to the barn. He said he asked Marilyn where she had been all night, and that she told him he thought she was sleeping with every guy in the valley. He stated that Marilyn picked up the rifle, pointed it at him, and told him that he was dead and that no other woman was going to have him. He said he heard a click, grabbed

the barrel of the rifle and wrestled it away from her. Jaimi testified that Marilyn screamed for Tiffnie to bring Marilyn's shotgun to her, and that when he got the rifle away from Marilyn, she turned around and ran. He said that he saw Tiffnie coming from the house, that he had the rifle at his hip, and that he thought Marilyn might be going to run around and get another gun. He said that he closed his eyes and that the gun went off several times. He opened his eyes and Marilyn was on her knees and bleeding. He said that Marilyn told Tiffnie to leave and that he told Tiffnie to call an ambulance. He testified that as he knelt beside Marilyn, Tiffnie came running toward them with a pistol saying, "I hate both of you guys." He said that Tiffnie fired the pistol two or three times and that he ran out of the barn. He stated that when he realized that Tiffnie was not coming after him he eased back to the barn and heard Tiffnie talking to her mother. He testified that he saw Tiffnie standing above her mother, heard the pistol go off, and saw Marilyn's hair fly up.

After the district judge denied the motion to dismiss, the defense attorney wrote a letter to the deputy attorney general who had been appointed as a special prosecutor in the case. In this letter the defense attorney set forth Jaimi's version of the events involved in the charges against him. He also sought to have the special prosecutor arrange for Jaimi to be given a polygraph examination and to make his own investigation of the charges. Subsequently, the defense attorney revealed to the special prosecutor all the evidence and information he had regarding the case and arranged for Jaimi to be interrogated by an investigator from the attorney general's office, without

the defense attorney being present. This interrogation took place and lasted over two hours. Jaimi divulged a great many more particulars concerning the alleged kidnapping, theft and murder.

On the motion of defense counsel venue was changed to Ada County and the three charges were consolidated for trial. The trial was scheduled to begin in Boise on April 15, 1985. On March 13, 1985, Jaimi indicated that he did not want the defense attorney to continue to represent him. The trial court allowed the defense attorney to withdraw and reappointed the public defender. Jaimi contended that the defense attorney had delegated too much of the investigation in the case to an investigator whom he described as "living in some kind of a fantasy world." Jaimi confirmed that it had been his desire to testify at the hearing on the motion to dismiss, that the decision to do so was a joint decision between him and the defense attorney, and that he agreed that was the best thing to do. Jaimi said he understood that if a new attorney was appointed to represent him, the trial would begin on April 15, 1984. He told the trial court that he wanted the trial to begin on that day. The trial court agreed that the defense attorney would be allowed to sit at counsel table with the public defender during the trial.

The trial began as scheduled on April 15, 1985. Before any evidence was received, the public defender moved to preclude the prosecution from using in any fashion Jaimi's statements during his testimony at the hearing on the motion to dismiss and during his interrogation by the investigator from the attorney general's office. The trial court denied the motion.

At the conclusion of the prosecution's case, the public defender moved to dismiss the kidnapping and theft charges on the ground that the court lacked jurisdiction, since there was no proof that the crimes occurred in Jerome County. The trial court agreed and dismissed the charges. The public defender then moved to strike all of the evidence that had been admitted relating to the kidnapping and theft cases. The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event. The trial court informed the jury that the charges had been dismissed. The trial then proceeded on the murder charge.

Jaimi did not testify at the trial. The public defender chose not to call him. The public defender felt that Jaimi's testimony would be "nit picked" by the prosecution, because of the availability of Jaimi's version of the events surrounding Marilyn's death provided by Jaimi's testimony at the hearing on the motion to dismiss, by the defense attorney's letter to the special prosecutor, and by Jaimi's interrogation by the investigator for the attorney general. The defense presented on Jaimi's behalf was designed to convince the jury that Jaimi shot Marilyn but did not kill her, or, that if he did kill her, he did not intend to. The defense argued that the killing did not amount to first degree murder.

Among the instructions given to the jury by the trial court was one concerning lesser included offenses. This instruction included a provision that the jury "should consider the included offenses only in the event the state has failed to convince you beyond a reasonable doubt of the guilt of the accused with respect to the crime charged."

Following the jury's verdict that Jaimi was guilty of first degree murder, a presentence report was prepared and the trial court conducted sentencing hearings. At the time of these hearings, Jaimi was represented by another private defense attorney (the second defense attorney). At one of these sentencing hearings a letter written to the trial judge by Marilyn's father was admitted in conjunction with the father's testimony. This letter described the relationship between Jaimi and Marilyn, including Jaimi's physical abuse of Marilyn and the circumstances surrounding Marilyn's shooting Jaimi in August 1983. The letter also discussed Jaimi's violent nature, his harassment of the Arbaugh family after Marilyn's death, the lack of any likelihood that Jaimi could be rehabilitated, and hearsay statements that were adverse to Jaimi. The letter had not been submitted with the presentence report, but the presentence report contained some of the same information in the form of statements from Marilyn's parents. Mr. Arbaugh adopted the letter as part of his testimony at the sentencing hearing. The trial court admitted the letter and added, "taking into consideration that probably great portions of it may be hearsay and stimulated by some prejudice and sympathy, and I will take that into consideration when reviewing it." The prosecutor asked Mr. Arbaugh the following question: "Mr. Arbaugh, is there anything else you would like to say to the Court as to what you think ought to happen to Mr. Charboneau in view of the damage caused to your family by his actions?" In response, Arbaugh stated:

> Well, I think anyone that's been around him that, the last two years that he was loose, knows if he was ever on the street again that the Arbaugh family would be going through the same thing again.

> He's vowed to destroy the Arbaugh family, and you see what he done to start with. There's no doubt in my mind that he wouldn't try to kill the rest of us.

He gave his opinion that Jaimi should be put to death or given a fixed life sentence. The second defense attorney was given an opportunity to cross-examine Mr. Arbaugh.

Following the sentencing hearings, the trial court made findings concerning aggravation and mitigation and sentenced Jaimi to death. Among the facts found by the trial court was that at the time Tiffnie went to the barn after she heard the first shots fired on July 1, 1984, Marilyn's life "probably could have been saved if she had received the necessary medical attention." The trial court also found that within not less than two minutes after leaving the barn Tiffnie heard more shots. The trial court concluded:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

The trial court found "beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (g)(5) and 19-2515 (g)(6)." The trial court was "unable to find any mitigating

circumstances which would overcome or outweigh the aggravating circumstances."

The second defense attorney filed an application for post conviction relief, including claims of ineffective assistance of counsel. Following a hearing on this application, the trial court denied the post conviction relief.

Following the appointment of the second defense attorney to become a district judge, he was allowed to withdraw as Jaimi's attorney. The trial court then appointed another attorney (the second public defender) to represent Jaimi. The second public defender filed another application for post-conviction relief alleging, among other things, newly discovered evidence relating to ineffective assistance of counsel. The hearing on this application dealt with a claim that the defense attorney had relied on "supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi." The trial court found that the letter the defense attorney had received from his niece shortly after August 23, 1984, did not influence the manner in which the defense attorney defended the case. The trial court denied post-conviction relief.

This Court has before it the mandatory review of Jaimi's death sentence, together with appeals from his conviction and from the denials of post-conviction relief. There are a plethora of issues involved in this case. We will address each of them in turn.

II.

DID CHARBONEAU RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

A. The standards.

1. Federal.

This Court has recently restated the test for determining whether a defendant has been denied effective assistance of counsel under the Constitution of the United States: "First, a claimant must prove that counsel's performance was deficient. Second, a claimant must show that this deficient performance prejudiced his or her case. [Citing *Strickland v. Washington*, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed. 674, 686 (1984)]" *Aragon v. State*, 114 Idaho 758, ___, 760 P.2d 1174, 1176 (1988).

In *Aragon* this Court also pointed out that "there is a strong presumption that counsel's performance falls within the 'wide range of professional assistance,'" and that "the defendant bears the burden of proof to show that 'counsel's representation fell below an *objective* standard of reasonableness.'" *Id.* at ___. Unless prejudice is presumed, "the defendant must affirmatively prove prejudice." *Id.* at ___. Prejudice is presumed only in cases such as "where the defendant is denied counsel altogether, or where counsel represents conflicting interests." *Id.* at ___.

2. State.

In *Aragon* this Court cited *Gibson v. State*, 110 Idaho 631, 635, 718 P. 2d 283, 287 (1986) for the proposition that " 'the Idaho Constitution potentially can be read to afford a broader right to effective counsel than does the federal Constitution.' " The Court then opined:

> To date that has not taken place. However, as noted in *Gibson*, we have not yet been required to define the differences between the rights afforded by federal and state constitutions. [Citation omitted.] Nor are we required to do so here. Our review of the record persuades us that the district court did not err in concluding that Aragon failed to establish that counsel's conduct contributed to the conviction.

114 Idaho at ___, 760 P..2d at 1177.

From *Aragon* we are bound to conclude that it remains the burden of one claiming ineffective assistance of counsel under the Idaho Constitution to prove that "counsel's conduct contributed to the conviction."

The starting point in evaluating counsel's conduct under the state constitution remains the American Bar Association's standards entitled "The Defense Function." (The ABA standards). *Aragon*, 114 Idaho at ___, 760 P.2d at 1177.

B. The issues.

1. Jaimi's testimony at the motion to dismiss hearing.

Reviewing Jaimi's testimony at the hearing on the motion to dismiss does not convince us that this testimony proves that he was denied effective assistance of counsel. While any of us in hindsight might conclude that Jaimi should not have testified at the hearing and given the prosecution five months to investigate the story he told, looking at the case as a whole, we cannot say that Jaimi has proved that the reliability of the result at trial would have been different if he had not testified at the hearing.

At the hearing Jaimi testified that Tiffnie had shot Marilyn with Marilyn's pistol after Jaimi had left the barn. Jaimi has continued to assert this version even after his conviction and even after his sentencing. Presumably this is the version that he would have told, if he had testified at trial. It was Jaimi's choice whether to testify at trial. The public defender advised him not to, and Jaimi accepted this advice. We can only speculate whether his testimony would have been impeached and whether the jury would have believed his testimony. It is Jaimi's burden to prove that the reliability of the result has been affected because he testified at the hearing on the motion to dismiss. We are not convinced that the reliability of the result was affected.

The premise of the claim of ineffective assistance of counsel with regard to Jaimi's pretrial testimony is that the defense attorney placed Jaimi on the stand without any legitimate reason or purpose. While it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices. *Aragon*, 114 Idaho at ___, 760 P.2d at 1177. The defense attorney testified in conjunction with the post-conviction relief proceedings that he knew the murder case was going to trial. He said that his objective in having Jaimi testify at the hearing on the motion to dismiss was to "embarrass the prosecutor into looking to the true facts" of the kidnapping and grand theft cases. The defense attorney disavowed any anticipation that the murder charge would be dismissed. Despite this stated lack of anticipation during the hearing on the motion to dismiss, the defense attorney questioned Jaimi in detail about the events leading to Marilyn's death on July 1,

1984. He also argued to the district judge that the murder charge should be dismissed on the ground that there was not sufficient evidence submitted at the preliminary hearing to support a finding of probable cause. While this inconsistency is troubling to us, we are unable to conclude that the defense attorney failed to render effective assistance of counsel to Jaimi concerning the pretrial testimony.

When confronted with the defense of serious felony charges such as those in this case, defense counsel may have to rely on creative and sometimes risky tactics to secure the best possible result for a defendant. We are not prepared to say that the decision to have a defendant testify in a pretrial proceeding is sufficient to indicate ineffective assistance of counsel. We find nothing in the American Bar Association's standards relating to "The Defense Function" that would indicate a deficiency of the defense attorney in calling Jaimi as a witness at the hearing on the motion to dismiss.

Three experienced and respected criminal defense attorneys testified at the first post-conviction proceeding that it was not competent representation for the defense attorney to have called Jaimi as a witness at the hearing on the motion to dismiss. These attorneys also testified that other actions of the defense attorney constituted incompetent representation. While we are respectful of the opinions of these attorneys, it is for us to determine in each case whether the constitutional mandate of effective assistance of counsel has been fulfilled. The question is one of law and not one of fact.

2. Divulging information and evidence to special prosecutor.

The letter of the defense attorney to the special prosecutor that was written after the hearing on the motion to dismiss, together with the conversation of the defense attorney with the special prosecutor, divulged all of the information and evidence that the defense attorney and his investigator had developed about the case. While other attorneys might not have pursued this course, we are not persuaded that this constituted a violation of Jaimi's right to effective assistance of counsel.

The defense attorney's stated purpose in divulging the information and evidence was to convince the special prosecutor to conduct an independent investigation. The defense attorney believed that if the special prosecutor and his investigators would pursue this investigation they would conclude that Jaimi was telling the truth and the cases would be resolved favorably. This may seem like a naive plan to those looking back now, but it is apparent that at the time, the defense attorney was convinced that this was the best course of action. He testified later that he wanted a polygraph examination of Jaimi and hoped that the special prosecutor would be persuaded by the investigation to give Jaimi the examination at state expense. He stated that resources were not available to him to have the examination otherwise. He stated that he did not believe that the district judge would have granted Jaimi the right to have a polygraph examination at county expense.

Even though divulging this information and evidence by the defense attorney did not produce the result the defense attorney wanted, we are not persuaded that it

was ineffective assistance for the defense attorney to have tried this tactic. There is no portion of the ABA standards that prohibits disclosures such as these by a defense attorney. It is true that Standard 4-3.1 requires that "the lawyer should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case." Here, Jaimi had already testified to his actions in relationship to the charges. The defense attorney divulged nothing new about Jaimi's version. The other information and evidence divulged by the defense attorney was the result of investigation by the defense attorney and his investigator, not what Jaimi had told them.

3. Jaimi's interrogation by the investigator.

The interrogation of Jaimi by the investigator from the attorney general's office was merely an extension of the plan that the defense attorney had initiated by divulging the information and evidence that were contained in his letter to the special prosecutor and his conversation with the special prosecutor and his investigators. We are not persuaded that allowing Jaimi to be interrogated by the investigator without counsel being present constituted ineffective assistance of counsel.

The defense attorney testified in the first post-conviction proceeding that he discussed the interrogation with Jaimi before it occurred, that he explained Jaimi's right to remain silent, and that Jaimi agreed that he should submit to the interrogation.

4. Failure to apply for funds to assist in the defense and failure to employ experts.

The defense attorney did not apply to the trial court for funds to investigate or to employ experts. No facts are asserted that would have been discovered by additional investigation. No expert testimony is offered that could have been produced if funds had been sought from the trial court. In the absence of this proof, we find no evidence of ineffective assistance of counsel on these grounds.

5. Inadequate investigation.

The defense attorney employed an investigator whom the defense attorney later described as a "flake." Jaimi now complains that the defense attorney did not investigate the charges thoroughly enough. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. Jaimi has not presented any evidence in order to substantiate that an inadequate investigation affected the outcome of the case.

6. Inadequate preparation for trial and failure to request continuance.

The public defender was appointed to replace the defense attorney approximately three weeks prior to trial. The public defender testified at the first post-conviction proceeding that he found that the case was not prepared for trial. He stated that he should have requested that the trial court vacate the trial to allow him to investigate the case further and to prepare for trial. No evidence has been offered as to what new facts or defenses could have

been developed if the trial had been continued and further preparation conducted.

7. Consolidation of cases.

The defense attorney sought and obtained the consolidation of the trials on the three charges on the premise that it would be to Jaimi's advantage to have all the facts concerning the events from June 21 through July 1, 1984, presented to the jury. Although many defense attorneys might not agree with this approach, we are not prepared to say that this choice amounted to ineffective assistance of counsel.

In his testimony at the first post-conviction proceeding the defense attorney described his reason for seeking the consolidation:

> Well, . . . they were all so interrelated that the only way that we could show that it was really the intent of Marilyn to murder Jaimi, rather than the other way around, that and from what Jaimi had told us that he had wrestled the gun, that she pointed the rifle at him and pulled the trigger, but it didn't go off, and that he took the gun away from her, and then is when she went dancing down the hall and when he shot her, and none that of (sic) would have had any meaning to the jury at all unless they had the whole scenario which would include the phoney (sic) rape allegation and the phony kidnap allegation.

He also testified that he discussed the motion with Jaimi before it was made.

Standard 4-5.2 of the ABA standards provides that the only decisions that must be made by the accused after full consultation with counsel are what plea to enter,

whether to waive jury trial, and whether to testify. This standard states:

> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

There was no obligation for the defense attorney to leave the decision on whether to request consolidation to Jaimi. We will not second guess the decision.

8. Reliance on clairvoyance.

In the decision on the second application for post-conviction relief the trial court found that none of the evidence directly established that the letter the defense attorney received from his niece about her clairvoyant contact with Marilyn had any influence on the manner in which the defense attorney defended the case. Our review of the record confirms this finding. Jaimi claims that the defense attorney relied upon his niece's clairvoyant contact with Marilyn and, therefore, did not investigate any alternative defenses. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. We conclude that this standard was not violated. The discussion of the defense attorney with his niece concerning Tiffnie's participation in the death of her mother occurred after Jaimi had related his new version of the facts to the defense attorney. There is no evidence to support the supposition that Jaimi's new version implicating Tiffnie was provoked by the clairvoyance of the defense attorney's niece or the defense attorney's belief in it. In the absence of such

evidence we are not prepared to use reliance on clairvoyance as a basis for ineffective assistance of counsel.

9. Failure to have psychological or psychiatric examination.

Jaimi asserts that the public defender or the defense attorney should have advised him about being examined by a psychiatrist or a psychologist before trial. No evidence is offered that would establish any defense for Jaimi through such expert testimony. The psychologist who examined Jaimi after his conviction and who testified in conjunction with the sentencing did not offer any opinion that would excuse the killing. His testimony indicated only that there was some possibility that Jaimi could be rehabilitated. We are unable to conclude that the failure to have Jaimi examined before the trial constituted ineffective assistance of counsel.

10. Excessive use of alcohol.

Jaimi contends that the defense attorney came to his cell on many occasions when the defense attorney was under the influence of alcohol. Even if we assume these allegations are true, no evidence is offered to show in what way this affected the defense attorney's representation of Jaimi.

11. Failure to object to evidence and to request mistrial.

The prosecutor referred in his opening statement to two "hot" checks that Jaimi had reportedly written in Battle Mountain, Nevada. When the checks were offered, the public defender objected, and the checks were not admitted. Jaimi argues that the failure of the public defender to object to the statement of the prosecutor and

to move for a mistrial constituted ineffective assistance of counsel. We cannot agree. No connection is made between the checks and the murder. We must assume that the jury followed the instructions of the trial court and made its judgment in the case based on the evidence presented and not on statements of counsel concerning evidence that was not connected with the homicide.

12. Failure to request a new trial.

Jaimi asserts that the public defender should have moved for a new trial. No basis for such a motion is suggested. We find no basis for supporting an ineffective assistance of counsel claim on this ground.

AS TO PART II: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur. BISTLINE, J., dissents.

III.

WAS THE LESSER INCLUDED OFFENSE INSTRUCTION ERRONEOUS?

Jaimi asserts that the trial court erred in giving the jury Instruction No. 15, concerning lesser included offenses. This instruction stated:

> The law permits the jury to find the defendant guilty of any lesser offense which is necessarily included in the crime charged in the Information, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.
>
> When you are deliberating with respect to each count, you should first consider the crime charged. You should consider the included offenses only in the event the State has failed to convince you beyond a

reasonable doubt of the guilt of the accused with respect to the crime charged.

The jury will bear in mind that the burden is always upon the Prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the Information; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Jaimi argues that the second sentence of the second paragraph of this instruction required the jury to agree unanimously to acquit Jaimi of first degree murder before they could consider any lesser included offenses. In support of this position Jaimi presents the instruction given by the trial court which states: "The verdict reached in this case must be unanimous, that is, you must agree unanimously as to whether the defendant is guilty or not guilty as regards any offense." *State v. Korbel,* 231 Kan. 657, 647 P.2d 1301 (1982) is cited as a basis for Jaimi's position on the error asserted. We find no error in the instruction given on lesser included offenses.

The major premise of the argument that Instruction No. 15 was erroneous is that the words "failed to convince you beyond a reasonable doubt" would be interpreted by the jury to mean "if you unanimously agree." The fallacy in this major premise is that the words "failed to convince you beyond a reasonable doubt" could reasonably only be interpreted by the jury to mean "if you cannot agree." These are precisely the words that the Kansas Supreme Court found to cure any problem with the instruction that was at issue in *Korbel.*

Instruction No. 15 allowed the jury to consider lesser included offenses if they could not agree that Jaimi was guilty of first degree murder. That was a correct statement of the law. We note that in *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085, (Ct. App. 1983) *rev. den.* (1984) our Court of Appeals considered an instruction relating to lesser included offenses. The comparable language in the instruction at issue there was: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of [the offense charged], you may still find him guilty of any such lesser offense . . . ." *Id.* at 897, 673 P.2d at 1091. While the point at issue in *Gilman* was not the same as presented here, our Court of Appeals did not question the propriety of this portion of the instruction. We denied review of the case. We are reinforced in our conclusion here by the implicit approval of this similar language in the instruction in Gilman.

AS TO PART III: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

IV.

FAILURE TO SUPPRESS USE OF JAIMI'S TESTIMONY AT THE HEARING ON THE MOTION TO DISMISS AND HIS STATEMENTS IN THE INTERVIEW WITH THE INVESTIGATOR FOR THE ATTORNEY GENERAL.

Jaimi asserts that the trial court erred when it refused to suppress the use of the testimony he gave at the hearing on the motion to dismiss and the statements he

made in his interview with the investigator for the attorney general's office. The motion to suppress was presented to the court before the receipt of any evidence in the trial of this case. In denying the motion the trial court stated:

> Well, my ruling will be as follows, and for the record I want to make it clear why I am ruling the way I am. As I related to you last evening at the conclusion of your motion, at the time we had the motion to dismiss hearing and at which time Mr. Charboneau did testify, I was very careful, I feel, in admonishing the defendant and advising him of his right to remain silent, that he did not have to testify, that if he did testify that anything he may say, that he would say, may later be used against him. We went into a second day on that hearing, and again on the second day I admonished him. I don't know what else you can do. I think he has the right if he so desires to waive his right to remain silent. He has the right to take the witness stand. He has the right to give testimony. In this motion he wants me to suppress it because he waived his right to remain silent and made a statement.
>
> And it's interesting for the record to note that Mr. Charboneau through counsel filed a lawsuit in Jerome County in a habeas corpus action alleging that we were violating his First Amendment right to freedom of speech. And a similar action involving Mr. Charboneau against the Sheriff of Jerome County is pending in Federal Court again alleging that he's violated Mr. Charboneau's right to freedom of speech, his First Amendment right. So it's a little inconsistent when on one hand you're complaining that his rights to remain silent were violated because he waived that right and took the stand, and then on the other hand he's complaining because we are violating his rights to freedom of speech. Inconsistent.

> That's a lengthy way to get to my ruling, but I want it as a matter of this record so that in review of this matter the higher court will know why I am ruling the way I am. The motion is denied. The State has the right to use the testimony from that hearing on the motion to dismiss, and the State has the right to use the interview between the defendant and Mr. Carr in all respects.

The record of the hearing on the motion to dismiss indicates that Jaimi was given ample advice both by the district judge and by the defense attorney of his right to remain silent. The interview between Jaimi and the investigator for the attorney general's office took place at the request of the defense attorney. Jaimi consented to talk with the investigator, was advised of his constitutional rights before the interview, and waived those constitutional rights.

To the extent that the State relied at the trial on any of Jaimi's testimony at the hearing on the motion to dismiss or his statements to the investigator for the attorney general's office there was no violation of Jaimi's rights. In fact, the record indicates that at trial the State did not attempt to rely on Jaimi's testimony at the hearing and used only a very minor portion of his statements to the investigator.

AS TO PART IV: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

V.

WAS PREJUDICIAL EVIDENCE ADMITTED ENTITLING JAIMI TO A NEW TRIAL?

Jaimi asserts that the trial court admitted inadmissible prejudicial evidence entitling Jaimi to a new trial.

While it is not entirely clear from the brief filed on Jaimi's behalf, the following are apparently the items of evidence that are referred to in this issue:

> Pictures of Marilyn's two children.
>
> Pictures of Marilyn's vehicle showing the vehicle identification numbers had been either totally or partially removed.
>
> Testimony of Marilyn's boyfriend as to statements Marilyn made on June 30, 1984, regarding Jaimi.

The record indicates that the only motion for new trial filed on behalf of Jaimi related to newly discovered evidence. In the absence of a motion for new trial on the basis of the allegedly inadmissible prejudicial evidence, there is no proper basis to bring this issue before this Court. In any event, we see no error in the trial court's admission of the evidence questioned in this issue. The only portion of this evidence that raises any question of impropriety is the testimony of Marilyn's boyfriend who was out with her the night before her death. The defense offered evidence of the relationship of Marilyn and Jaimi up to the time of her death. In rebuttal the State offered the testimony of the boyfriend as to statements made to him by Marilyn the night before her death about her relationship with Jaimi. The boyfriend's testimony indicated that Marilyn told him she was worried because she did not know where Jaimi was. That testimony was admissible under I.R.E. 803, as evidence of her existing state of mind.

AS TO PART V: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

VI.

FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING AFTER DISMISSAL OF THOSE CHARGES.

Jaimi asserts that the trial court erred by failing to strike from the record all evidence pertaining to the grand theft and kidnapping charges after those charges had been dismissed for lack of jurisdiction. At the time the trial court denied the motion to strike this evidence, the district judge stated that the evidence pertaining to the grand theft and kidnapping would have been admissible, even if those charges had not been filed and consolidated with the first degree murder charge. The district judge stated: "This thing occurred over a period of some ten or twelve days and I think the jury needs the benefit of all of that testimony in order to properly arrive at a decision, whichever way they decide." We agree.

I.R.E. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *State v. Needs*, 99 Idaho 883, 892-93, 591 P.2d 130, 139-40 (1979) this Court approved the admission of evidence that two weeks prior to the homicide the defendant assaulted the victim with a butcher knife on the grounds that the evidence of this assault tended to show the defendant's motive or intent. We believe the same is true of the evidence of the kidnapping and grand theft here.

The circumstances of these acts indicated the hostility of Jaimi toward Marilyn.

AS TO PART VI: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

VII.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

Jaimi asserts that there was not sufficient evidence to support the verdict of the jury. We disagree.

As this Court has pointed out in another recent first degree murder case where this same issue was presented:

> In analyzing appellant's contention, the appropriate standard of review is whether there is substantial competent evidence to support the jury's verdict. [citations omitted] Our function on appeal is to examine the supporting evidence, not to place ourselves in the jury's position or reweigh the significance of evidence as it relates to specific elements. [Citations omitted.] On appeal, all facts, and inferences to be drawn from those facts, are construed in favor of upholding the lower court decision.

State v. Aragon, 107 Idaho 358, 366, 690 P.2d 293, 301 (1984).

The evidence in this case, together with the inferences that the jury could have drawn from that evidence, provide a sufficient basis for the verdict of the jury. Jaimi had previously perpetrated several acts of violence toward Marilyn. He had also made threats to kill her. He purchased the rifle a few days before Marilyn's death.

Shortly before Marilyn's death Tiffnie heard shots. When she went to the barn to investigate, Tiffnie observed Jaimi holding a rifle pointed at Marilyn as Marilyn sat wounded on the ground. A short time later, Tiffnie and Tira heard more shots and found their mother apparently dead. Jaimi was found by the investigating officers in a nearby field with the rifle lying nearby. At the time of his apprehension Jaimi acknowledged to the arresting officers that he had shot Marilyn. These facts and the inferences were sufficient for the jury to find that Jaimi unlawfully killed Marilyn with malice aforethought, wilfulness, deliberation, and premeditation. *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979).

AS TO PART VII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

VIII.

POST-CONVICTION HEARINGS.

A. The first hearing.

Jaimi asserts that the findings of fact and conclusions of law of the trial court after the first post-conviction hearing were erroneous. This hearing dealt with the alleged ineffective assistance of counsel. We have reviewed the findings of fact in light of the evidence submitted at the hearing and find that these findings were supported by substantial competent evidence. The conclusions of law announced by the trial court are consistent with our conclusions here as to the ineffective

assistance of counsel based on the facts submitted at the hearing. We find no error in them.

B. The second hearing.

1. Failure to consider evidence.

At the second post-conviction hearing the trial court limited the evidence to matters that were not presented on the original application for post-conviction relief. At the hearing the primary issue that was addressed was the purported reliance of the defense attorney on clairvoyance in preparing Jaimi's defense. The public defender also testified regarding his state of preparation before trial and how the errors of the defense attorney prejudiced his ability to defend Jaimi. Jaimi asserts that the trial court failed to consider the testimony of the public defender at this hearing.

The transcript of the second post-conviction hearing reveals that the trial court allowed testimony of the public defender relating to matters that were considered at the first hearing "for foundation purposes in order to make more clear [the] testimony in this matter." The trial court stated definitely that it was not going back and adjudicating any of those issues that it had already ruled on in the original application. The second defense attorney stated to the trial court that he did not intend to relitigate those issues, "but rather to show how those issues affected the trial stage of this case." The trial court then commented:

> For guidance, counsel, I will agree with you, that if you are going to proceed on this amended application for post-conviction relief, alleging that the defendant's Sixth Amendment rights were violated, you do

> have to show not only that they were violated but how they affected the trial of this case, so I would allow you to show that and, likewise, go back into it. ... But I'm not going to relitigate any of those other issues.

In the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing, the trial court stated that the only new issue raised concerned a claim that the defense attorney relied "on supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi Charboneau and, therefore, allegedly rendered ineffective the assistance of counsel provided by [the defense attorney]."

We conclude from this record that the trial court did not intend to consider the testimony of the public defender that went beyond this new issue, except by way of background. We agree that this was proper. Essentially, Jaimi contends that the trial court failed to consider the effect that the defense attorney's reliance on clairvoyance had on the public defender's ability to render effective assistance to Jaimi in the trial. The fallacy in this position is that in its findings and conclusions after the second post-conviction hearing the trial court concluded that clairvoyance played no part in the strategy for Jaimi's defense developed by the defense attorney. Therefore, we conclude that there was no basis for the trial court to rule that this strategy affected the public defender's defense of Jaimi.

2. Were the findings and conclusions erroneous?

Jaimi asserts that the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing were erroneous. We have reviewed

those findings and conclusions. The findings of fact are supported by substantial competent evidence. The conclusions of law are in concurrence with our own conclusions contained in this opinion concerning the relationship of clairvoyance to the effective assistance of counsel.

AS TO PART VIII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

IX.

SENTENCING.

A. Participation of jury.

Jaimi asserts that the imposition of the death penalty with no participation by the jury in the sentencing process violates the sixth, eighth, and fourteenth amendments to the Constitution of the United States. He also contends that the sentence was unconstitutional because he was denied a jury determination of the aggravating circumstances enumerated in I.C. § 19-2515(g).

In 1983 this Court held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." *State v. Creech*, 105 Idaho 362, 373, 670 P.2d 463, 474 (1983) *cert. den.* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). *See also State v. Sivak*, 105 Idaho 900, 902, 674 P.2d 396, 398 (1983) *cert. den.* 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887, (1984); *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985)

cert. den., 479 U.S. 870, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986); *State v. Fain*, Slip Op. No. ___ (released today). In 1984 the United States Supreme Court upheld death sentencing by trial judges. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

This Court has also held "that Art. 1, § 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." *Sivak*, 105 Idaho at 904, 674 P.2d at 400. *See also Fain*, Slip Op. No. ___ (released today).

Jaimi contends that despite these decisions, since I.C. § 19-2515(g) "links an enhanced punishment to specific enumerated factual findings," it "usurps the jury's fundamental role in deciding whether the fact is so." In *Richmond v. Arizona*, 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) *reh. den.*, 434 U.S. 812, 98 S.Ct. 49, 54 L.Ed.2d 69 (1977) Justice Rehnquist, sitting as a circuit justice, denied an application for suspension of an order denying certiorari or, in the alternative, for a stay of execution. In his opinion Justice Rehnquist stated:

> Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth, and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt* [*v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)].

434 U.S. at 1325, 98 U.S. at 9, 54 L.Ed.2d at 36. Jaimi correctly points out that this issue was not presented to the entire Supreme Court, but only to Justice Rehnquist. Jaimi argues that *McMillan v. Pennsylvania*, 477 U.S. 79,

106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) supports his position on this issue. It is interesting that Justice Rehnquist also wrote the opinion for the Court in *McMillan*, including the statement "that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. In his decision Justice Rehnquist cited *Proffitt* for the proposition: "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, ..." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. The crux of the decision in *McMillan* was the conclusion that the fact at issue there – visible possession of a firearm – was not an element of the crimes for which the defendants were convicted, but were instead "a sentencing factor that comes into play only after the defendant has been found guilty. . . ." *McMillan*, 477 U.S. at 84, 106 S.Ct. at 2416, 91 L.Ed.2d at 72. That is how we view the aggravating circumstances listed in I.C. § 19-2515(g).

To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in *Adamson v. Ricketts*,

865 F.2d 1011 (9th Cir. 1988). In *Adamson* the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the sixth amendment. During reargument of this case to determine what impact Adamson might have on our opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that *Adamson* correctly states the requirements of the sixth amendment on this issue.

Judicial sentencing in capital cases does not violate the sixth amendment. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). *Adamson* attempts to distinguish *Spaziano* on the ground that in *Spaziano* "the Court never reached the particular contention *Adamson* has raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment." 865 F.2d at 1028. We disagree.

In *Spaziano* the Court noted that the Florida capital sentencing statute that was at issue directed the sentencing judge "to determine whether statutory aggravating circumstances were outweighed by statutory mitigating circumstances." 468 U.S. 450 n.4, 104 S.Ct. at 3157 n.4, 82 L.Ed.2d at 343 n.4. The Florida statute was similar in the important aspects to those portions of I.C. § 19-2515 relating to death penalty sentencing. The Florida statute provided that the sentencing judge should weigh the aggravating and mitigating circumstances. If the judge imposed a sentence of death, the judge was required to set forth in writing "findings upon which the sentence of

death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (6) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(3)(b). The aggravating circumstances enumerated in the Florida law at issue in Spaziano were similar in some respects to those contained in I.C. § 19-2515(g). Significantly, one of the aggravating circumstances in Florida was: "The capital felony was especially heinous, atrocious, or cruel." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(6)(h). This is substantially the same as I.C. § 19-2515(g) (5) that is at issue here, except that our statute adds the qualifying phrase, "manifesting exceptional depravity."

The Florida Supreme Court noted in its decision "the trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person." *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981). On certiorari the United States Supreme Court held:

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. . . . The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. *Arizona v. Rumsey*, [467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)]. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate

> punishment to be imposed on an individual. [Citations omitted, except] *Williams v. New York*, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

468 U.S. at 454, 104 S.Ct. at 3161, 82 L.Ed.2d at 347.

These comments were made by the Court in considering death penalty sentencing by a judge under a statute substantially similar to our statute and with findings of aggravating circumstances similar to those here. This convinces us that the Court inherently considered and rejected the premise of the Ninth Circuit in Adamson: that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment.

AS TO PART IX(A): SHEPARD, C.J., and BAKES, J., concur.

BISTLINE and HUNTLEY, JJ., dissent.

B. The letter from Marilyn's father.

1. Hearsay.

Jaimi asserts that it was a violation of the hearsay rule for the trial court to admit the letter written by Marilyn's father. We agree.

Prior to the sentencing hearings, the second defense attorney filed a motion "for a formal sentencing hearing in accordance with the provisions of Idaho Code §§ 19-2515, 19-2516, and that the defendant be afforded

all of the rights, both procedural and substantive, therein provided." I.C. § 19-2516 states:

> The circumstances [in aggravation or mitigation of punishment] must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section. I.C. § 19-2515(d) provides for a presentence investigation in all death penalty cases and states that after the investigation the court shall "convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation."

This Court has approved the consideration by a sentencing judge in a death penalty case of the presentence investigation report provided for in I.C. § 19-2515(d), despite the requirement for live testimony in I.C. § 19-2516. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). In reaching its decision in that case this Court stated: "We hold that the closing language of I.C. § 19-2516 clearly and unambiguously provides an exception to the otherwise required oral testimony and that those authorizations of I.C. § 19-2515 fall within the purview of the intended exception." 105 Idaho at 368, 670 P.2d at 469. We note that in Creech the defendant had "demanded that the entire sentencing record be produced by live witnesses testifying in open court, basing his

demand on I.C. § 19-2515 -2516 and the case law interpreting those statutes." 105 Idaho at 365, 670 P.2d at 466. *Cf. State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980) and *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) (no demand for a formal sentencing pursuant to I.C. § 19-2516).

The letter in question here was not part of a presentence report. Even if it had been, the hearsay could only have been included "where the presentence investigator believes that the information is reliable." I.C.R. 32(e)(l). Although the letter was offered and admitted at the time Mr. Arbaugh was testifying, permitting cross-examination of Mr. Arbaugh as to the statements made in the letter, this did not cure the hearsay nature of the statements. We construe I.C. § 19-2515(d) to permit the parties in a formal sentencing hearing to present all relevant evidence that would otherwise be admissible. Under *Creech* the contents of presentence investigation reports are an exception to this requirement. The state would have us also except from the requirement for live testimony under I.C. § 19-2516 "all relevant evidence" as referred to in I.C. § 19-2515(d). This interpretation would make relevant hearsay admissible in a sentencing hearing, even though it was not included in a presentence investigation report.

We note that the Idaho Rules of Evidence, except those with respect to privileges, do not apply to sentencing proceedings. I.R.E. 101(e)(3). Therefore, there is no conflict between I.C. § 19-2515(d) and these rules that would render the statute of no force or effect under I.R.E. 1102. However, if we were to allow all relevant hearsay to be admitted in formal death penalty sentencing hearings

we would destroy the requirement of I.C.R. 32(e) (1) that hearsay included in presentence reports be only that which the presentence investigator believes is reliable. The practice would quickly become for hearsay to be offered at the hearing rather than through the presentence report. Therefore, we hold that the letter should not have been admitted.

We are not dissuaded from our conclusion on this issue by the statement of the trial court in the written sentencing findings that he had "endeavored to avoid anything that might be hearsay, not absolutely pertinent or not totally supported by the evidence." (FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515, p. 13) In a matter as awesome as the decision whether to impose the death penalty, a strict compliance with the procedures for sentencing is required. Even a well intentioned and conscientious effort by the trial court to avoid considering the hearsay contained in the letter does not suffice.

AS TO PART IX B(1): HUNTLEY, J., concurs.

BAKES, and BISTLINE, JJ., concur in the result.

SHEPARD, C.J., dissents.

2. Victim impact statement.

Jaimi also asserts that Mr. Arbaugh's letter should not have been admitted because it was a victim impact statement (VIS), prohibited in death penalty cases by *Booth v. Maryland*, 428 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). We agree. We also take this opportunity to advise the trial court on resentencing to apply *Booth* to the VIS contained in the presentence report.

In *Booth* the Court held that the introduction of a VIS at the sentencing phase of a capital murder case violates the eighth amendment to the United States Constitution. The Court held invalid a Maryland statute that requires consideration of a VIS describing the effect of the crime on the victim and the victim's family. Here, the State filed a motion for the trial court to receive Mr. Arbaugh's letter into evidence pursuant to I.C. § 19-5306(1)(b) and (3). That statute provides:

> (1) Upon request, each victim of a felony offense shall be:
>
> . . . .
>
> (b) Consulted by the presentence investigator during preparation of the .presentence report and have included in that report a statement of the impact which the defendant's criminal conduct has had upon the victim;
>
> . . . .
>
> (3) The provisions of this section shall apply equally to the immediate families of homicide victims or immediate families of victims of such youthful age or incapacity as precludes them from exercising these rights personally.

This statute is similar to the Maryland statute considered by the Court in *Booth*.

The presentence report contains an indication that the investigator received both written and oral comments from Marilyn's parents. These comments were included in the report as a VIS. This VIS refers to the relationship between Marilyn and Jaimi, assaults on Marilyn by Jaimi on several occasions, pleas by Marilyn to Jaimi that he stay away from Marilyn and her children, statements by Marilyn to her father about threats made toward Tiffnie

and Mr. Arbaugh by Jaimi, and a handwritten will by Marilyn naming her daughters as beneficiaries as a result of her expectation of the outcome of the threats by Jaimi. The report also indicates that Marilyn's mother told the presentence investigator that Tira seemed to have withdrawn into herself after Marilyn's death. Marilyn's parents are reported by the presentence investigator to have a deep fear of Jaimi and to have expressed the hope that the trial court would take measures to insure the safety of themselves and Marilyn's two daughters.

Mr. Arbaugh's letter to the trial judge was written almost five months after the presentence report was submitted. Much of the information contained in the letter had already been included in the VIS portion of the presentence report. We note that the second defense attorney moved to strike the VIS portion of the presentence report.

In *Booth* the Court found that two types of information were included in the VIS: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members, opinions and characterizations of the crimes and the defendant." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The Court found that "this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The letter did not contain the first type of information described in *Booth*, but did contain the second type. The VIS portion of the presentence report contained both types of information.

While sentencing in death penalty cases in Idaho is by a judge and not by a jury, as is the case in Maryland, we do not consider this to be a distinction that makes Booth inapplicable to a VIS in a death penalty case in Idaho. Although we have upheld sentencing by district judges in death penalty cases, we are not prepared to interpret the eighth amendment to give judges more latitude than juries in making their decisions as to whether a defendant should be executed. The risk of arbitrary and capricious decisions exists whether the sentence is determined by a jury or a judge. Therefore, we hold that the letter should not have been considered by the trial court in the sentencing. We advise the trial court that when resentencing Jaimi, as provided below, Booth should also be applied to the VIS contained in the presentence report. We also declare that I.C. § 19-5306(1)(b) and (3) are unconstitutional under the eighth amendment insofar as they allow the two types of information proscribed in Booth to be considered in a death penalty case.

AS TO PART IX B(2): BAKES, BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, C.J., dissents.

C. Findings.

1. Did the trial court improperly consider aggravating circumstances not listed in I.C. § 19-2515?

Jaimi asserts the in its FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515 (the Findings) the trial court improperly considered circumstances not listed in the statute. Secondarily, he asserts that he was gravely prejudiced because when the

trial court considered these circumstances, he was denied notice that the trial court would predicate its sentence on these circumstances. We disagree with both of these assertions.

As an example of the findings that he argues were objectionable, Jaimi cites the portion of the Findings which states that at the time Tiffnie left the barn after finding her mother bleeding and wounded with Jaimi standing over her, "the life of Marilyn Arbaugh probably could have been saved if she had received the necessary medical attention." He argues that if he had been notified that the trial court intended to consider this circumstance, he would have contested the issue vigorously. He also contends that the consideration of these "non-statutory aggravating circumstances" violated the cruel and unusual punishment clause of the eighth amendment and permits circumstances not found beyond a reasonable doubt to enter the sentencing decision.

This Court has previously rejected all these arguments except the one based on the eighth amendment. *Creech*, 105 Idaho at 369-70, 670 P.2d at 470-71; Sivak, 105 Idaho at 905, 674 P.2d at 401. With regard to the eighth amendment claim, we note that the trial court concluded the Findings by stating:

> This Court finds beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (G)(5) and 19-2515 (G)(6). This murder was especially heinous, atrocious and cruel thereby manifesting exceptional depravity. Further by this murder and the circumstances surrounding its commission, Jaimi Dean Charboneau exhibited utter disregard for human life.

Through this portion of the Findings the trial court made clear that its decision was not based on non-statutory aggravating circumstances. Therefore, we need not address the eighth amendment argument.

AS TO PART IX C(1): SHEPARD, C.J., BAKES, and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

2. Findings not supported by evidence.

Jaimi asserts that there was not sufficient evidence to support a critical portion of the Findings. He challenges the following statement of the trial court:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

Jaimi relies on the testimony of the State's pathologist to rebut the trial court's statement that Marilyn could have been saved, if she had received necessary medical attention before the final shots were fired. The pathologist testified that the cause of death was gunshot wounds of the chest that severed arteries to the heart and lungs. He stated that he had no opinion as to which of the bullets caused the fatal wounds and that it was beyond the expertise of a pathologist to give an opinion as to the

order in which the wounds occurred. There is no other evidence in the record that contradicts this testimony. Therefore, we agree that there is no evidence in the record that supports the trial court's statement.

It is unclear from the Findings whether the trial court would have imposed the death penalty without having concluded that Marilyn was not mortally wounded until the second volley of shots was fired. For that reason, together with others expressed above and below, we vacate the sentence and remand for resentencing.

AS TO PART IX C(2): BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, C.J. and BAKES, J., dissent.

3. Mitigating factors.

Jaimi asserts that the trial court failed to list in the Findings all the mitigating factors that were presented. He argues particularly that the trial court failed to consider significant family information contained in the presentence report. We have compared the trial court's statement of mitigating factors with the presentence report and are unable to agree with Jaimi on this issue. All of the material mitigating information contained in the report is reflected in the Findings.

AS TO PART IX C(3): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

4. Vagueness of I.C. § 19-2515(g)(5) and (6).

Jaimi asserts that I.C. § 19-2515(g)(5) and (6) are unconstitutionally vague and that their use in determining Jaimi's sentence violates the eighth amendment. He

argues that *Maynard v. Cartwright*, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and *Adamson v. Ricketts*, 865 F.2d 1011 (1989) support his position with regard to I.C. § 19-2515(g)(5). He argues that the meaning given to I.C. § 19-2515(g)(6) in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) was inadequate. We disagree.

In *Maynard* the Supreme Court held that the "especially heinous, atrocious, or cruel" aggravating circumstance of the Oklahoma death penalty statute was unconstitutionally vague under the eighth amendment because it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty. The decision of the Tenth Circuit Court of Appeals that was affirmed in *Maynard* (*Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987)) noted that the Oklahoma courts had not "adopted a limiting construction that cured the [vagueness] infirmity." 486 U.S. at ___, 108 S.Ct. at 1857, 100 L.Ed.2d at 376. In its opinion the Supreme Court also distinguished the situation in *Maynard* from that in *Proffitt v. Florida*, 428 U.S. 242, 254-56, 96 S.Ct. 2960, 2972-73, 49 L.Ed.2d 913, 925-26 (1976).

In *Osborn* this Court adopted the definition of "heinous, atrocious and cruel" of the Florida Supreme Court that was approved in *Proffitt*. This court quoted the following interpretation of the Florida court:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. *What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set*

> *the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*" [Citation omitted.] (Emphasis added.)

102 Idaho at 418, 631 P.2d at 200.

This Court also adopted the definition of "exceptional depravity" of the Nebraska Supreme Court in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881, 891 (1977) *cert. den.*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158, *reh. den.*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977). This Court quoted the following definition of the Nebraska court:

> "In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence."

102 Idaho at 418, 631 P.2d at 200.

We find that these definitions remove the vagueness from I.C. § 19-2515(g)(5) that would cause us to hold the use of it to be in violation of the eighth amendment according to *Maynard*.

In *Osborn* this Court also construed the "utter disregard for human life" provision of I.C. § 19-2515(g)(6):

> [W]e hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515(f)(2), (3), and (4) [now §§ 19-2515(g)(2), (3), and (4)]. We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human

> life, i. e., the cold-blooded, pitiless slayer. With such an interpretation, it is our conclusion that this aggravating circumstance meets the constitutional requirements set forth by the United States Supreme Court.

102 Idaho at 419, 631 P.2d at 201.

We agree.

Our opinion as to this issue is not changed by *Adamson v. Ricketts*. In *Adamson* the Ninth Circuit held that the interpretation by the Arizona Supreme Court of the portion of Arizona's death penalty sentencing statute that is similar to I.C. § 19-2515(g)(5) was not sufficient "to provide satisfaction of *Godfrey's [Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)] mandate that aggravating circumstances objectively guide discretion and narrow application of the death penalty." 865 F.2d at 1033. We note that *Godfrey* cited *Proffitt v. Florida* without distinguishing its rationale or its result. 446 U.S. at 425, 100 S.Ct. at 1764, 64 L.Ed.2d at 403. As we have indicated above, the definition of "heinous, atrocious and cruel" adopted by this Court in *Osborn* was that of the Florida Supreme Court that was approved in *Proffitt*. Therefore, we are convinced that whatever validity there may be to the decision in *Adamson* concerning the Arizona definitions of their statutory terms, the definitions contained in *Osborn* remain constitutionally sufficient.

AS TO PART IX C(4): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

5. No duplication of aggravating circumstances.

The trial court found that the aggravating circumstances referred to in both I.C. § 19-2515(g)(5) and (6)

were present in this case. Jaimi asserts that it was improper for the trial court to use both of these aggravating circumstances in determining his sentence, because they duplicate each other. Today, this Court has held that these two factors are not duplicative. *State v. Fain*, 1989 Slip Op. No. ___. Therefore, we reject Jaimi's assertion.

AS TO PART IX C(5): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

6. Weighing mitigating circumstances against I.C. § 19-2515(g)(5) and (6) separately.

I.C. § 19-2515(c) states:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

Jaimi asserts that this statute requires the trial court to weigh all the mitigating circumstances presented against each aggravating circumstance found, separately. He argues that if the trial court finds that all the mitigating circumstances presented outweigh any one of the aggravating circumstances found, then the sentence of death may not be imposed. He contends that this required weighing was done incorrectly by the trial court in this case. We agree that all the mitigating circumstances presented must be weighed against each of the

aggravating circumstances separately. We hold that the trial court may not sentence the defendant to death, unless the trial court finds that all the mitigating circumstances outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.

Criminal statutes must be strictly construed. *State v. Thompson*, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980). I.C. § 19-2515(c) refers to "mitigating circumstances" that are to be weighed against "any aggravating circumstance found." If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a group, it would have referred to "the aggravating circumstances found." The plain meaning of the statute dictates our conclusion on this issue.

We are unable to accept Jaimi's argument that the statute requires the trial court not to impose the death penalty, if the mitigating circumstances outweigh any one of the aggravating circumstances found. The plain meaning of the statute is that the mitigating circumstances must outweigh "any" of the aggravating circumstances. The word "any" means "whichever one chance may select." *Webster's Third New International Dictionary*, (1969). For the mitigating circumstance in this case to outweigh "any" aggravating circumstances found, the mitigating circumstances must outweigh each of the aggravating circumstances, since chance may select either one.

In its findings the trial court quoted I.C. § 19-2515 as stating:

> Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any *aggravating circumstances* found and make imposition of death unjust. (Emphasis added).

In making its decision as to the appropriate sentence to impose, the trial court said:

> After due consideration to all the facts contained herein, the Court is unable to find any mitigating circumstances which would overcome or outweigh the *aggravating circumstances* and must therefore comply with the legislature's mandate. (Emphasis added).

It appears to us that the trial court weighed all the mitigating circumstances against the two aggravating circumstances found, collectively rather than separately. For this reason also, we vacate the sentence and remand for resentencing in accordance with our decision.

AS TO PART IX C(6): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

7. Presumption of death.

Jaimi asserts that I.C. § 19-2515 violates the eighth and fourteenth amendments because it places the burden on a defendant to prove the existence of mitigating circumstances that outweigh any aggravating circumstance that is found. We disagree.

I.C. § 19-2515(c) presumes that a life sentence is the sentence for first degree murder. Only if at least one of the aggravating circumstances listed in I.C. § 19-2515(g) is found to exist beyond a reasonable doubt may a sentence of death be imposed. It is only then that a defendant has

the burden of coming forward with mitigating circumstances. To the extent that Adamson reaches a contrary result, we disagree with the Ninth Circuit.

AS TO PART IX C(7): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

X.

AUTOMATIC REVIEW UNDER I.C. § 19-2827.

A. Was the sentence imposed under the influence of passion, prejudice, or any other arbitrary factor?

Jaimi asserts that the sentence of death in this case was arbitrary because there was no evidence to support portions of the Findings that we have reviewed above. To the extent of our holdings above that there was not sufficient evidence to support portions of the Findings, we agree. We disagree that there was arbitrariness because mitigating factors concerning Jaimi's family background were not considered. We also disagree that there was arbitrariness because this was an act of passion rather than a case involving malice aforethought. That question was submitted to the jury, and the jury found otherwise.

B. Did the evidence support the findings of a statutory aggravating circumstance under I.C. § 19-2515?

We have held above that there was no evidence in the record to support the trial court's statement that Jaimi could have saved Marilyn's life, if he had sought medical attention for her. We have also held that it was a violation of *Booth v. Maryland* and the hearsay rule for the trial

court to admit and consider the letter written by Marilyn's father. Therefore, it is unnecessary for us to consider at this time whether the evidence supports a finding of either statutory aggravating circumstance under I.C. § 19-2515(g) (5) and (6). This review can be made following resentencing, if it is necessary.

C. Was the sentence excessive or disproportionate to the penalty imposed in similar cases?

In light of our decision to vacate the sentence, this review is also unnecessary.

AS TO PART X: HUNTLEY, J., concurs.

SHEPARD, C.J., concurs in result.

BAKES, J., concurs in all of Part X, except that part which incorporates the analysis of Part IX(C)(2), with which he disagrees.

BISTLINE, J., expresses no opinion.

XI.

CONCLUSION.

For the reasons stated above, we affirm the conviction, vacate the sentence, and remand for resentencing.

SHEPARD, C.J. concurring in part and dissenting in part.

I concur in the majority opinion except parts IX B and IX C(2), and as to those portions I disagree and therefore dissent.

The majority holds that during the sentencing procedure a letter written by the father of the victim was

improperly "admitted" in violation of the hearsay rule. This, although the report of the presentence investigator, is also hearsay and in fact hearsay upon hearsay. I believe the focus of the majority opinion, the hearsay rule, is inapplicable. In my view the letter, while "hearsay," was at worst only duplicative of the oral testimony of that same witness at the sentencing hearing. That oral testimony taken in open court was subject to cross-examination. Hence the admission of the letter written by the father of the victim was at most harmless error.

The testimony of that witness, both oral and written, in essence related the well justified fear of the remaining members of the family of defendant Charboneau. In my view such evidence was particularly relevant since, as indicated by the majority opinion, the defendant Charboneau had accused his stepdaughter of the killing.

I also disagree with the majority holding that *Booth v. Maryland*, ___U.S.___ (1987), requires the exclusion of the Arbaugh letter, and portions of the presentence report as being a "victim impact statement." *Booth* was a jury setting death penalty case rather than a court setting death penalty case. That alone, in my view, makes *Booth* distinguishable from the instant case. Further, *Booth* was a 5-4 decision by the then membership of the then Court. In view of the vigorous dissents to *Booth* and the now changed membership of that Court, I am not persuaded that the now constituted United States Supreme Court would continue the view espoused in *Booth*.

I.C. § 19-5306 requires a sentencing court to consider the impact of the crime upon the immediate families of homicide victims. I perceive no constitutional invalidity

of that statutory scheme since here we consider only Idaho's mandated court setting of the death penalty.

I disagree with the conclusion of the majority in IX C(2). In my view the majority opinion, in its recitation of the facts, supports the language of the trial court in its sentencing. The testimony of Tiffnie supports the statement of the trial court.

I would affirm the conviction and the imposition of the death penalty.

HUNTLEY, J., concurring and dissenting.

While I support the death penalty and concur in the bulk of the majority opinion, I respectfully suggest that Idaho's present capital sentencing procedure is unconstitutional because it removes the jury from its constitutional fact-finding role. Our process violates the federal constitution for the reasons stated in *Adamson v. Ricketts,* (Ct. App. 9th Cir., December 22, 1988) and violates the Idaho Constitution for the reasons I have articulated in *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983) and *State v. Sivak,* 105 Idaho 900, 674 P.2d 396 (1983). I will discuss each analysis in turn.

I.

The Jury as Fundamental to Preserving Democracy

The determination of the issue presented on appeal should be made in the context of the history and purposes of the right to trial by jury. Our forefathers wisely provided in Article 1, Section 7 of the Idaho Constitution: "The right to trial by jury shall remain inviolate . . . " They so provided because they recognized that the jury

system is the single most important guardian of the people's right to be protected from oppressive and overreaching government.

Few Americans realize that the right to jury trial in civil cases has almost been lost in England. English judges, with the acquiescence of a compliant bar, have totally eliminated the right to trial by jury in civil cases, except in cases of libel or slander. The English themselves seem to have forgotten the words of their eminent jurist, Blackstone, who wrote that trial by jury is:

> . . . the glory of the English law . . . [i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals.

Blackstone Commentaries 79.

Some American judges and legislators have similarly lost touch with the following language in our Declaration of Independence:

> [George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: . . . For depriving us, in many cases, of the benefits of trial by jury . . .

The French philosopher and essayist, de Tocqueville, who understood and appreciated democracy in America with keener insight than any other observer of the Nineteenth Century, stated that the jury system in America:

> . . . places the real direction of society in the hands of the governed . . . and not in . . . the government . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen

> to govern by their own authority and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

II.

The Federal Right to Jury Fact Finding in Capital Cases

In *Adamson v. Ricketts*, the 9th Circuit stated the issue:

> Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree.

The Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona statutory scheme. Noteworthy is the fact that Idaho and Arizona are two of only four states which have the death penalty which have taken the jury out of the fact-finding process of making the ultimate determination as to whether the death penalty is appropriate. The fact that thirty-one of the thirty-five states which have the death penalty utilize the jury in making that determination speaks volumes as to what our Anglo-American traditions and constitutions require.

As the *Adamson* court noted:

> An aggravating "circumstance" which elevates a murder to a "death-eligible" murder in the penalty phase, remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial. Like an element of a crime, an aggravating circumstance in the Arizona scheme informs the prosecutor what facts must be proven to obtain a conviction. The circumstance must be proven beyond a reasonable doubt. The hearing is adversarial, with oral argument and the prosecution's presentation of evidence governed by the usual rules of evidence. The presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances. If the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation or the death penalty will be imposed. A.R.S. §§ 13-703; see also Arizona v. Rumsey, 467 U.S. 203, 21 (1984). If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death. Cf. Poland v. Arizona, 106 S.Ct. 1749, 17454 (1986) (Court framed the relevant [*39] inquiry as "whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case for the death penalty and hence has 'acquitted' petitioners"); Rumsey, 467 U.S. at 212 (where findings of fact at sentencing hearing were all favorable to defendant, he was "acquitted" of the death penalty).

Although Idaho's majority in *Charboneau*, similarly to the judiciary in Arizona and the prosecutors in both states, urge that a trial court in finding facts as to aggravating circumstances is exercising a "sentencing determination" as distinguished from finding the elements of a death-eligible murder, their use of the language in justifying that position frequently results in Freudian slips

which indicate otherwise. In fact, to rule for the state's position it is necessary to do exactly what the majority did in this case, that is, engage in a circular argument, the majority reasoning at pages 28-29:

> To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. *The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder.* It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

The sentence I have underscored is totally circular. Of course, if one can pronounce that the circumstances are part of sentencing and not part of the elements of a death penalty crime, then they are not elements of a death penalty crime.

The plain fact is, before a person is eligible to be executed, a *finding* must be made that the aggravating circumstances existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty.

It could of course be argued that my position is circular if I were to take the underscored sentence from the majority opinion, *supra*, and restate it as follows:

> The circumstances listed in the statute are not circumstances to be considered in sentencing but are elements of death-eligible murder.

However, I would submit that the issue is best resolved by recognizing that it is traditional and accepted jurisprudence that every factor required to prove a crime is considered an element of that crime. One cannot be sentenced to death without the finding of the aggravating circumstances having taken place and, thus, they would appear to be essential elements of the crime rather than some less important procedural matters occurring during sentencing.

The United States Supreme Court has not passed directly upon the issue presented in this case, but what it has written about the jury and its function in death penalty cases indicates that the process would be best served by bringing the four states in line at this time.

Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are "the cross-section of the community," reflecting community values. *Duren v. Missouri*, 439 U.S. 357, 359 99 S.Ct. 664, 666, 58 L.Ed.2d 579 (1979). Only a representative jury assures "meaningful community participation." *Ballew v. Georgia*, 435 U.S. 223, 235 98 S.Ct. 1029, 1036, 55 L.Ed.2d 234 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and background, *Taylor v. Louisiana*, 419 U.S. 522, 531-33 95 S.Ct. 692, 698-699, 42

L.Ed.2d 690 (1975); the different segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result," *id.* at 532 n. 12 95 S.Ct. at 698 n. 12. See *Humphrey v. Cady*, 405 U.S. 504, 509 92 s.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. *Ballew v. Georgia, supra*, 435 U.S. at 232 98 S.Ct. at 1035.[1] Twelve individuals are obviously more likely to reflect the prevailing views of society than one person.[2]

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois, supra*, 391 U.S. at 519-20 88 S.Ct.at 1775-1776. "The jury . . . is a significant and reliable objective index of

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[1] *Ballew* also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia*, 435 U.S. 223, 232-39 [98 S.Ct. 1029, 1035-38, 55 L.Ed.2d 234] (1978) (plurality opinion).

[2] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. *S. Gillers, Deciding Who Dies*, 129 U.Pa.L.Rev. 63, n. 298.

contemporary values because it is so directly involved," *Gregg v. Georgia, supra,* 428 U.S. at 181 96 s.Ct. at 2928. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since "[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits." *Dennis v. United States,* 341 U.S. 494, 525 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[3] made even more difficult because judges – whether considered in terms of race, sex, or economic class – do not reflect the wide range of backgrounds or

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[3] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, *Public Opinion and Federal Judicial Policy,* 21 Am.J.Pol.Sci. 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Aeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stan.L.Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

beliefs within the community.[4] "[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," *Gregg v. Georgia, supra,* 428 U.S. at 182 96 S.Ct. at 2929. For a variety of reasons, judges appear less likely to reflect that same reluctance.[5]

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[4] As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from $24,000 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: *The End of Tokenism, in Women in the Courts,* 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, Number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

[5] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant only 72 percent of the time. *H. Kalven & H. Zeisel, The American Jury,* 68 (1966). In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, *id,* at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent

(Continued on following page)

even more compelling where life stands immediately in the balance.

III.

The Idaho Constitutional Mandate

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

"Right to trial by jury. – The right of trial by jury shall remain inviolate . . . ." That right of trial by jury as it

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(Continued from previous page)

imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," *Proffitt v. Florida*, 428 U.S. 242, 252 96 S.Ct. 2960, 2966, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. *Id.* at 249-50 96 S.Ct. at 2965-2966. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. *Gillers, supra*, note 2, at 58-59. *Cook, Public Opinion and Federal Judicial Policy*, 21 Am.J.Poli.Sci. 567, 623 (1977). Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19-2827. See, *Gregg v. Georgia*, 428 U.S., at 204-06 96 S.Ct. at 2939-2940; *id*, at 211-12, 96 S.Ct. at 2942-2943 (White, J., concurring).

existed at the time our constitution was adopted, provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> [A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.

Section 17 was carried over verbatim into Revised Statute § 6563 (1887) enacted two years before the adoption of the Constitution.

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In *Blue Note Inc. v. Hopper*, 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

> The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.

Accord. Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); *Christensen v. Hollingsworth*, 6 Idaho 87, 53 P. 211 (1898); *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme court of the United States struck down the death penalty statutes of most states through its 1972 decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of *Furman*, I.C. § 18-4004 read:

> Punishment for murder. – Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

In its first post-*Furman* session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the "cruel and unusual punishment" aspects disapproved in *Furman*. I.C. § 18-4004 was amended by striking out the words as lined out below:

> 18-4004. PUNISHMENT FOR MURDER. – Every person guilty of murder in the first degree shall suffer death ~~or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted.~~ Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

The 1973 Amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19-2515:

> 18-4004. PUNISHMENT FOR MURDER. ~~Every~~ Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder ~~in~~ of the first degree shall ~~suffer~~ be punished by death or by imprisonment for life. Every person guilty of murder ~~in~~ of the second degree is punishable by imprisonment ~~in the state prison~~ not less than ten (10) years and the imprisonment may extend to life.

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. *McGautha v. California*, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 29 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina*, 428 U.S. 280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the Furman decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of

involving jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

RS 1954

S 1082

STATEMENT OF PURPOSE

> Only a few years ago, the United States Supreme court made new "rules" concerning the imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Section 18-4003 and 18-4004, Idaho Code.
>
> Then, last year, the United States Supreme court again changed the rules relating to capital punishment – after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.
>
> *The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions* on capital punishment so that we will conform with this latest expression of the law. (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests the the Supreme Court decisions mandated the

removal of the jury from its traditional powers and functions; the United States Supreme court never at an earlier time or in this "latest expression of the law" required jury non-involvement.

Since jury participation in the capital sentencing process is part of the right to "trial by jury" as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

IV.

Interim Solution by District Judges

Since this Court has not seen fit to bring the Idaho sentencing process into a constitutional posture, and since the current session of the Idaho Legislature has not even formally taken up the effect of *Adamson*, we are undoubtably going to be faced with a year or more of uncertainty while we await the review of *Adamson* by the United States Supreme Court on Certiorari. Should the 9th Circuit be affirmed, then all death sentence cases in Idaho which have been imposed in that interim period will have to be reversed and remanded for resentencing, if not a total new trial. I believe there is a method whereby our Idaho district judges, exercising their intelligence and their plenary power, can bring order to this chaos and validly complete capital cases. It has always been the law of Idaho that district judges have the power to call for advisory juries in cases where juries are not mandated by statute or common law. Our district judges

could, on their own motion, adopt the procedures of the thirty-one other states by bifurcating the trial and bringing the jury in as an advisory jury at the sentencing phase. So that the jury would be fully apprised of the seriousness of its undertaking, the district judge would inform the jury that he would not impose the death penalty unless they so recommended. The district judge would, of course, retain his traditional power under Idaho law to impose a sentence less than death if he deemed such reduction appropriate. By engaging in this procedure, a district judge would not only be doing a service to the taxpayers by way of judicial economy in obviating the need for retrials or resentencing, but additionally the court would be properly serving both society and the defendant by protecting the constitutional right to trial by jury.

BISTLINE, J. dissenting.

I

In this capital murder case, where the guilt of the accused would be determined by a jury, and where a guilty verdict might be of murder in the first degree, murder in the second degree, or voluntary manslaughter, defense counsel's *first* strategic tactic was to utilize the results of a SEANCE conducted by a spiritualist; from the report of this seance counsel unquestionably believed that he had received the "true facts" concerning the homicide caused by gun shot wounds. Armed with the "true facts," counsel then devoted his talents toward convincing the prosecutors that the real culprit was not defendant, but the deceased's daughter. Having wholly

succumbed to relying entirely on that hypothesis, counsel not only forewent making any of the ordinary preparations for a defense, but, even more damaging to the defendant, exposed him for uncounseled interrogation by prosecuting authorities.

Generally, a person's willingness to learn life's past or future secrets from a spiritualist, fortune-teller, a seer or even a Ouija board, would be of no concern. However, if Charboneau's then counsel was rendering "effective assistance of counsel," as the majority today holds, then the sixth amendment's guarantee of right to counsel has flown the coop. As Chief Justice Shepard has written, there is no insurance that defendants will receive a perfect trial – there is only the guarantee of a fair trial. A fair trial cannot be had if a defendant is precluded from being represented by counsel who is knowledgeable and competent. Such was not the circumstance here. Worse yet, the defendant appears to have had no outside counselling or advice of any kind which would have informed him that he was being inadvertently escorted down the primrose path. The defendant could have fared no worse had he been in charge of his own case. The record makes it readily apparent that defense counsel simply was not aware that his efforts were bizarre, and, equally unaware that counsel's chosen course of conduct was extremely prejudicial to his client's constitutional right to remain silent.

This Court has properly recognized that the Idaho Constitution, where appropriate, can provide more pro-

tection than its federal counterpart.[7] However, the Idaho Supreme Court cannot, through the magic wand of a judicial decree, disavow or disregard the sixth amendment protections guaranteed by the Constitution of the United States.[8] Unless and until the federal courts in *habeas corpus* or post-conviction relief proceedings hereafter intercedes, the ineffective assistance of counsel doctrine in this jurisdiction has today been rendered meaningless.[9]

II

In addition, the majority has reacted to the well-reasoned decision of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), by rejecting it even before there has been any review by the Supreme Court of the United States. In that manner, Charboneau and other capital defendants

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[7] *See State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988) (Idaho Constitution prohibits use of roadblocks designed to apprehend drunk drivers absent warrant or probable cause); *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988) (Idaho Constitution prohibits use of pen registers on citizens' telephones absent warrant or probable cause).

[8] Article 1, § 3 of the Idaho Constitution provides: "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

[9] I concur in Parts III, IV, V, IX(B)(1) (with explanation), IX(B)(2), IX(C)(2), IX(C)(3), IX(C)(6), IX(C)(7) and dissent to Parts I, II, VI, IX(A), IX(C)(1), IX(C)(4) and IX(C)(5). I express no opinion as to Parts VII, VIII, X and XI, because a proper resolution of this case would render those issues entirely moot.

similarly situated are deprived of the fundamental right to jury sentencing guaranteed by both art. 1, § 7 to the Idaho Constitution and the sixth amendment to the Constitution of the United States. These concerns will be addressed in turn.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Initially, the majority sets the stage for this aberration by failing to understand and utilize the proper standard of review. Under the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1989), a criminal defendant must establish: (a) counsel's deficient performance, and (b) prejudice. With this much the majority is in accord. However, under the prejudice prong, it does *not* have to be shown that without counsel's error the defendant would have otherwise earned an acquittal. The heavy burden of such an outcome-determinative test was specifically rejected by the Supreme Court in *Strickland*. Although such a standard is appropriate for assessing a motion for a new trial based on newly discovered evidence, in regard to ineffective assistance of counsel claims, the defendant need only establish " . . . that there is a *reasonable probability* that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability *sufficient to undermine confidence in the outcome.*" 104 S. Ct. at 2068 (emphasis added).

Thus, the majority rejects *Strickland's* mandate and affixes to Charboneau the burden of proving the result of the trial would have been different absent the replete errors of commission and omission attributable to

defense counsel, specifically placing all reliance on the results of the seance and at the same time making not even a cursory attempt at preparation for an extremely crucial trial.[10]

Not only does the majority fail to comprehend the proper standard for evaluating ineffective assistance of counsel claims, it also shows little regard for the record. Without question, counsel Bennett relied upon the results provided from a seance in charting the course for his representation of Charboneau. The prosecutor who originally handled this case for Jerome County testified to his knowledge that Bennett contacted his niece in California, a clairvoyant, that through a seance the niece was able to "contact" the victim, Marilyn Arbaugh, that the spirit of Marilyn stated that her murderer was not Charboneau, but her daughter Tiffnie, and that the fatal shot was from a different gun not belonging to Charboneau. The prosecutor's testimony:

> Q. Will you, please, state your full name for the record.
>
> A. Dannis M. Adamson.
>
> Q. And where do you live?
>
> A. I live seven north, three east of Jerome.

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[10] The majority opinion states: "It is Charboneau's burden to prove that the *result would have been different,* if he had not testified at the hearing on the motion to dismiss." Slip Op. at 12 (emphasis added). Such a burden is unrealistic. Absent a retrial, that theorem is unsusceptible of proof. The fact is that defense counsel did make the decision to have Charboneau testify.

Q. Okay. And your occupation, please?

A. I'm an attorney.

Q. How long have you been an attorney?

A. Since 1979.

Q. All right. I understand you were prosecuting attorney here in Jerome for a while; is that correct?

A. That's correct. For the last part of '82 and all of '83 and '84.

Q. Okay. Dan, are you familiar with the Jamie Charboneau case?

A. I certainly am.

Q. And how is it that you're familiar with that case?

A. I was the prosecuting attorney for Jerome County representing the State of Idaho in State of Idaho versus Jamie Charboneau; three, three different counts: Grand theft, rape, and first-degree murder.

Q. Okay. And I understand that the Attorney General's office was appointed to prosecute that action sometime during the proceedings; is that right?

A. Okay. It became obvious that the trial was not going to take place before I left office because I did not rerun for the prosecutor's position; and when that decision was made, that's when the Attorney General's office came in, yes.

Q. All right. Dan, did you ever have any private conversations with Golden Bennett concerning this case?

A. Yes.

Q. Okay. And when did you have these particular conversations?

A. Well, we had various conversations ranging from, from when he was first appointed; but I talked with him regularly before the preliminary hearing, before Mr. Charboneau was bound over to District Court, conversations on a regular basis.

. . . .

Q. Dan, you said there was one particular theory that he elicited to you in a conversation. Where did it take place?

A. Well, again bits and pieces, even in the hallway, but primarily I think in my office and, the prosecutor's office.

Q. Who was present during that particular conversation?

A. Well, I'm almost certain [defense investigator] Mr. Coakley was and Golden Bennett and myself.

Q. Okay. Could you relate to the court what the substance of that conversation was?

A. Well, basically, it was: You've got to bring in the .22 revolver pistol. You have to change the focus of your investigation and take the heat off my client and place it on Tiffy, Tiffnie Arbaugh, because she's the one that shot the, made the final shot into her mother.

And my question was, well, how do you know all this? And frankly, I expected him to say that his client told him so, and in fact in some of the earlier suggestions as to how this crime had happened, he had gotten those from Mr. Charboneau. But this particular instance dealt with the fact that he had contacted his niece or cousin or something like that in California, that she conducted a seance and that she had communicated with Marilyn Arbaugh, the victim in the case, and that Marilyn had indicated how much she loved Jamie Charboneau, and that even though she was upset that her daughter had shot the

final shot, she also forgave her because she knew how much she had hurt her, et cetera, et cetera, et cetera. And it was kind of a long drawn-out statement as to what this dead person had said through the seance, trying to convey her love to Jamie Charboneau, and forgiving her daughter for shooting her.

Tr., Vol. 23, Post-conviction Relief Hearing, 57-62.

Mr. Bennett's secretary also testified. She stated that much of the pre-trial defense was concentrated on summoning assistance from the world of the supernatural. Her testimony on post-conviction proceedings was corroborative of the prosecutors.

Q. Okay. Are you familiar with a Jamie Charboneau case?

A. Yes.

Q. How is it that you're familiar with that?

A. Well, I worked for Golden for about four months in '84 and the first part of '85 when he was defending Jamie.

Q. Okay. Golden was representing Jamie during this entire time; is that correct?

A. Yes.

Q. Did you ever witness any conversations between Golden Bennett and his investigator James Coakley?

A. Yes.

Q. Okay. And where were these conversations? Where did they take place?

A. In Golden's office.

Q. All right. And who was present at the time?

A. Golden, Jim Coakley, Golden's daughter-in-law Jean, myself, Peggy, I can't tell you who was there

every, you know, for every conversation, but people that work in the office.

Q. Okay. When did these conversations take place?

A. Well, they'd – the whole time that I was working there on several occasions.

Q. Were they frequent, all the time? Were they now and then? What were they?

A. They were frequent. That was the case that, Golden's big case he was working on when I was there. They talked about it a lot.

Q. Okay. And would you relate to the Court the substance of these conversations?

A. Well, they were planning their strategy, what, how they were going to try to help Jamie with the information that Jim Coakley was furnishing Golden.

Q. And what was that?

A. Well, he was trying to contact the deceased's spirit on several occasions. He said that it was an unfriendly spirit. And then one day we came to work and he said that he'd contacted her the night before and as far as I know that's what Golden was basing his information on.

Q. Okay. Did they talk about clairvoyants during this period of time?

A. Yes.

Q. Often?

A. Yes.

Q. Okay. And did you hear Golden Bennett talk about clairvoyants?

A. Yes. Not as much as Jim did, but, yes.

Tr., Vol. 23, Post-conviction Relief Hearing, 163-65.

Defense counsel was preoccupied with using the results of a seance in preference to utilizing the traditional measures relied upon by defense lawyers: fact investigation coupled with legal research. Moreover, rather than independent investigation of the circumstances of the case, defense counsel approached the Attorney General's office in an attempt to persuade the State to investigate. As defense counsel explained in his deposition:

> My purpose in going to Boise was to convince the attorney general's office that an independent investigation was needed, and that it wouldn't be done properly in Jerome County, *and I had complete faith in the attorney general's office, I still do,* and it just seemed like the appropriate way to go at the time.

Deposition of Golden Bennett at 27 (emphasis added). *Thus, instead of accepting the responsibility of embarking on his own factual investigation, defense counsel relied upon the prosecutorial arm of the State to do it for him.* The lack of investigation and preparation for trial is also shown by the testimony of Randy Stoker, the attorney who ultimately, and on short notice, represented Charboneau at trial:

> I picked up that case in a posture *where there had been virtually no investigation done,* there were no readable, credible witness statements in the file. *There were no jury instructions prepared.* Jaimi had never been examined by a psychiatrist or psychologist. *There was no ballistics experts hired. There were no pathological testimony from a defense standpoint.* There was nothing in terms of what I would consider assistance to me at that point in the file that I was handed from his previous counsel.

Vol. II, Post-conviction Relief Hearing at 27 (emphasis added).

The American Bar Association's "Defense Function" upon which the majority heavily relies, provides that:

> *It is the duty of the lawyer to conduct prompt investigation of the circumstances of the case* and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.* The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-4.1 (1982) (emphasis added). While the standard makes clear that the defense attorney should try to secure information and evidence through discovery, an *independent* investigation is also required. *Otherwise, if it be true that the prosecution can properly be relied upon to do all of the investigative tasks for an accused, the adversarial nature of our criminal system of justice breaks down.* As observed in *Strickland,* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the *adversarial process* that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S. Ct. at 2064 (emphasis added).

In *Kimmelman v. Morrison,* 106 S. Ct. 2574 (1986), the Supreme Court was asked whether a defense counsel's failure to file a timely suppression motion, due to a lack of investigation, constitutes ineffective assistance of counsel. The Court held that it did:

> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation. '[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' [citations] Respondent's lawyer neither investigated, nor made a reasonable decision to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ' "ample opportunity to meet the case of the prosecution," ' [citations] and the *reliability of the adversarial testing process.*

106 S. Ct. at 2588-89 (citations omitted) (emphasis added).

Defense counsel not only failed to investigate, but he also subjected his client to examination by the State for no legally recognizable purpose. Moreover, at defense counsel's invitation the State was allowed to interrogate Charboneau for two hours, without defense counsel being present. The scope of the questioning was not limited and Charboneau was left to fend for himself. The majority readily and properly concedes that "Charboneau divulged a great many more particulars concerning the alleged kidnapping, theft and murder." Slip Op. at 6.

Defense counsel also called Charboneau to the stand to testify at the preliminary hearing, thereby waiving the constitutional right to remain silent. The majority says of this strange affair, "[w]hile it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices." Slip Op. at 12. The majority is only half right in stating that premise. True, unsuccessful but reasonable tactical decisions should not be the basis for finding ineffective assistance of counsel, but only so long as the

strategic choices have some *plausible basis in the record.* As this Court's opinion in *Aragon v. State (Aragon II),* 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) stated: "When counsel's trial strategy decisions are made upon the basis of inadequate preparation, ignorance of the applicable law, or other shortcomings capable of *objective* evaluation, the defendant may very well have been denied effective assistance of counsel" (quoting *State v. Tucker,* 97 Idaho 4, 10, 539 P.2d 556, 562 (1975) (emphasis added in *Aragon* II)).

This case stands in stark contrast to *Aragon II,* where the ineffective assistance contention lay in failing to call witnesses to bolster the accused's character. The decision not to call character witnesses was reasonable, so it was held, because counsel, associate counsel and an investigator had interviewed Aragon's family and people that knew him; thereafter, *counsel made the informed decision* that the defense would not be helped by calling such persons. 114 P.2d at 763, 760 P.2d at 1179. Unlike *Aragon II,* however, *defense counsel in the instant case engaged in no independent factual investigation* upon which to base principled strategic decisions.

The majority concludes that defense counsel's performance was effective because nothing contained in the American Bar Association's standards prohibits counsel from placing the accused on the stand as a witness at the preliminary hearing. However, as the High Court made clear in *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed.

> 1980) ('The Defense Function'), are guides to determining what is reasonable, *but they are only guides*. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

104 S. Ct. at 2065 (emphasis added). Indeed, a case may arise where it is in the defendant's interest to testify at the preliminary hearing. However, in the case at bar no reason for calling Charboneau to testify has surfaced, other than as it might somehow induce the Attorney General to investigate the case with the thought in mind that the murderer was not Charboneau.

Subjecting the unrepresented defendant to the State's questioning on two occasions was not enough. Defense counsel also put Charboneau on the stand when the Motion to Dismiss was heard. Defense counsel, however, was certain that the Motion to Dismiss would not be granted. His purpose was only to embarrass the prosecution into conducting a more thorough investigation along the aforesaid avenues. However, anything Charboneau might say in such circumstance later could then be used to impeach him at trial if he were to testify. One expert witness, practicing attorney and formerly a judge, Lloyd Webb, stated that defense counsel's decision to place Charboneau on the stand in order to embarrass the prosecution was: *"Nonsense. You don't embarrass prosecutors into making proper investigations that way. This is not a judgment call. This is just plain incompetency. I can't understand Mr. Bennett and why he did that."* Vol. I, Post-conviction Hearing at 56 (emphasis added).

Thus, Charboneau was denied effective assistance by the defense counsel's: (a) placing unbridled reliance on the report given to him as to the results of the seance in formulating the "defense" which he conducted; (b) failure to investigate the facts of the case, proceed with discovery, and generally make the necessary preparations for trial – as against merely relying on the prosecution to investigate the case along the lines defense counsel outlined, thereby undermining the adversarial nature of the criminal justice system; and (c) allowing the state the unfettered opportunity to interrogate Charboneau without counsel being present; and (d) calling Charboneau as a witness at the preliminary hearing and hearing on the motion to dismiss absent any plausible basis for so doing.

B. FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING CHARGES

The majority holds that evidence of the felony charges of kidnapping and grand theft was properly not stricken, even though both charges were dismissed at the close of the prosecution's case for lack of jurisdiction. It is said that such evidence shows Charboneau's motive or intent under I.R.E. 404(b). The majority opinion supplies the trial court's reasoning for not granting the motion: "The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event." Majority Slip Op., p.7. On page 24 of the Majority Slip Opinion is added to the foregoing this sentence: "This thing occurred over a period of some ten or twelve days and I think the jury needs the benefit of all that testimony in order to properly arrive at a decision, whichever way they decide."

The majority then disposes of this extremely crucial evidence by recounting the facts of an earlier (1979) case which – wholly unlike this case – was in large part based on circumstantial evidence. A burned torso, minus head and legs, was discovered, and authorities made a tentative identification that the corpse was the remains of one Ron Needs. This led to the arrest of Sally Needs, and thereafter a trial on a charge of murder. The prosecution proved the identity of the corpse to the satisfaction of the jury by circumstantial evidence.

Sally Needs was convicted based on the testimony of a witness who in mid-June saw Sally Needs arm herself with two butcher knives, and brandish them at Ron Needs, who disarmed her. The witness testified that Mrs. Needs threatened that she was going to get him – also then throwing gasoline on him. On appeal Sally Needs contended that the trial court erred in allowing in the testimony of the assault, which was established as having been two weeks prior to Ron Need's death. This Court held that it was not error to allow the testimony, the rationale being that "[s]uch evidence is clearly relevant to her motive and intent as well as to shed considerable light on her mental attitude towards Ron Needs." 99 Idaho 883, 893, 591 P.2d 130, 140 (1979). Although that language is somewhat overbroard, it met with my approval then, and continues to. That was an unusual set of circumstances.

Here we have a homicide which took place with witnesses in the area. What I remember best in the *Needs* case is the statement that "Idaho courts do follow the general rule *that evidence of other unrelated criminal activity is inadmissible at trial to show criminal propensity on the part*

of the accused." 99 Idaho 883, 892, 591 P.2d 130, 139 (1979) (emphasis added).

Here, the two charges of kidnapping and a grand theft, neither related to the homicide, were both alleged to have taken place when Charboneau on June 21, 1984, entered his former wife's car and drove off with her the car allegedly keeping her captive until she escaped. The car was alleged to be valued at over $150.00.

Those two unrelated charges were *not* filed in connection with the July 1 homicide charge which was later filed on July 2, 1984. It was defense counsel who conceived that strategic "tactic" of promoting a single trial of all three charges. As pointed out in Mr. Fuller's opening brief in this Court, the district court attempted to dissuade defense counsel from such foolishness:

> [T]he Court acknowledged that it was improper to consolidate the three criminal trials and that Jaimi was going to be prejudiced. He stated:
>
> > And I might further add, if Mr. Charboneau will recall, I did my level best and *even fought with counsel to separate these trials*. I didn't want them all held together; I wanted to separate the one from the other. And Mr. Charboneau and counsel wanted it held together. So that's one of the problems we run into by holding it together. Objection overruled.
>
> Trial Tr., Vol. II, p. 375, L. 4-11 (emphasis added).

Upon the State resting its case, Mr. Stoker moved to dismiss the kidnapping and grand theft charges on jurisdictional grounds that had been discussed early in the trial with the trial court judge. Both charges were dismissed because jurisdiction was wholly lacking. Then Mr. Stoker attempted to strike the evidence concerning the issues involved in the grand theft and

kidnapping counts that he had tried to exclude earlier. In response to Mr. Stoker's Motion to Strike, the Court stated:

> There is no evidence whatsoever that all or any part of the crime occurred in Jerome County, and that would -- jury would have to speculate as to that, it would be pure speculation. That's why I'm taking it away from them . . . I am concerned about the defense' motion to instruct the jury. (Motion to Strike) I think that I would have to so instruct them, because -- and here is another part -- *this is the thing that bothered me about this case a long time ago, is when the defense was always wanting to join all of these cases for trial.* I turned down that Motion I don't know on how many occasions. Finally, at the last session when you were together where the state joined and the defense joined, I allowed it to go through. *It bothers me that the jury does have in their minds all of the other evidence . . . and I don't know if I can cure that with an instruction.*

Trial Tr., Vol 6, p. 1361, LL. 20-25, p. 1352, LL. 1-15.

. . . .

> When one considers all of the facts, the bottom line is that the defendant was prejudiced and could have received a verdict other than first degree murder. In fact, there was an extremely good possibility that the defendant could have been convicted of voluntary manslaughter.

Appellant's Brief at 247-50 (emphasis added).

C. JURY DETERMINATION OF LIFE OR DEATH

The majority continues to repudiate the mandate of art. 1, § 7 of the Idaho Constitution, thereby robbing the capital defendant of the right to a jury trial. The life or death decision had always been within the exclusive

province of the jury in Idaho, until the legislature in 1977 passed the current version of I.C. § 18-4004, drafted and sponsored by the Attorney General. The steady stream of dissents from Justice Huntley and later myself beginning with *State v. Creech*, 105 Idaho 363, 670 P.2d 463 (1983), have failed to persuade a majority of this Court, or the legislature, that the Idaho Constitution requires jury participation in capital sentencing.

Today the majority takes on bigger game and now rejects the sound reasoning of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), holding that the Arizona capital sentencing scheme – remarkably similar to Idaho's – violates the sixth amendment right to a jury determination of each element of the offense charged.

In *Admason* the Ninth Circuit stated:

> Under Arizona's revised code, all murder is not capital murder. Since 1973, Arizona has required that *before a death sentence may be imposed* the trial judge must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. While Arizona has formally subdivided murder into at least four categories – first degree murder, second degree murder, manslaughter and negligent homicide – it appears that aggravating circumstances in fact operate to create an additional category of murder. While the statute's nomenclature ('aggravating circumstances') suggests they are mere factors guiding the judge in his or her determination of the appropriate penalty, all other indicators confirm that aggravating circumstances are additional *elements* necessary for a finding that a defendant is guilty of the distinctive offense of capital murder. Finding aggravating circumstances results in the only crime in Arizona for which a defendant may receive a death sentence.

___ F.2d at ___ (filed December 22, 1988) (emphasis and parentheses in original; footnotes omitted). Like Arizona's aggravating circumstances, Idaho's capital sentencing statute. I.C. § 19-2515, constitutes elements of the crime of capital murder. Simply put, an Idaho citizen cannot be put to death unless the evidence establishes an aggravating circumstance, the *sine qua non* of capital murder. Accordingly, when the presence of such an element is determined by a trial judge – and not a jury – the right to a jury trial guaranteed by the Idaho and federal constitutions is violated.

A majority of the Court, however, shuns *Adamson* on the basis of the Supreme Court's decision in *Spaziano v. Florida*, 104 S. Ct. 3154 (1984), which held that judge-sentencing in capital cases does not violate the eighth amendment prohibition against cruel and unusual punishment. However, in *Adamson* the Ninth Circuit convincingly demonstrates that the

> [Supreme] Court's examination in *Spazizno* was limited to the constitutionality of judicial 'sentencing' and evaluation of 'the appropriate punishment to be imposed.' 468 U.S. at 458-59. *The Court never addressed a claim of judicial fact-finding as to an element of the offense. Thus the Court never reached the particular contention Adamson raised*: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment. Sentencing, or the ultimate determination of an appropriate penalty, involves the *weighing* of factors. Such weighing is completely distinct from threshold findings of whether requisite elements even exist from which the trier-of-fact draws conclusions on guilt or innocence.

> *Thus, Spaziano is not controlling in this case, as it left untouched the question of the right to a jury trial* where the aggravating circumstances of a state's death penalty statute are elements of a capital offense.

___ F.2d ___ (footnote omitted)(emphasis added). The ultimate outcome is, of course, up to the Supreme Court of the United States, but whatever it may be, that Court surely will address the issue as one of first impression, and not "inherently" mandated by *Spaziano* as the majority of this Court today erroneously concludes.

D. THE HEARSAY LETTER FROM THE VICTIM'S FATHER

The majority holds that the letter written by the victim's father and admitted at the penalty phase of the trial was inadmissible hearsay. With that much I agree However, a majority of this Court adheres to the view that hearsay contained in a presentence investigation report can properly be considered by a trial judge weighing aggravating against mitigating circumstances.

Idaho Code § 19-2516 provides:

> **Inquiry into circumstances – Examination of Witnesses.** – The circumstances *must be presented by the testimony of witnesses examined in open court,* except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

(Emphasis added.) I remain convinced that the mandate of the legislature expressed in I.C. § 19-2516 and that of the founding fathers expressed in the due process clauses of the state and federal constitutions prohibits the admission of presentence investigation reports obtained by hearsay and containing hearsay. As stated on an earlier occasion:

> [T]he Court simply cannot in any show of conscience continue to let capital sentencing be hinged on unsworn statements and other forms of hearsay. It is now clear that a capital case involves two trials. The first is to try the issue of the accused's guilt. If convicted, the second is to try the issue of the circumstances of his crime and the facets of his character. Common sense dictates that the second trial for his life is the defendant's more important trial. Can it be then that in Idaho we have a rule that while due process obtains at the guilt trial, anything goes at the second trial which determines the issue of life and death? Until recently, I had thought that removing the element of due process from the second trial was such a monstrous proposition as to be undeserving of discussion or comment.

State v. Sivak, 105 Idaho 900, 920-21, 647 P.2d 396, 416-17 (1983) (Bistline, J. dissenting).

It seems exceptionally clear to me that unless the system has broken down to the point where it is permissible to allow a jury – as the sentencing authority – to have placed before it anything and everything which a presentence investigator comes across or can stir up, then, and only then, should a district judge as sentencing authority likewise be so influenced.

E. VAGUENESS OF AGGRAVATING CIRCUMSTANCES

The cruel and unusual punishment prohibitions of the state and federal constitutions require that the sentencer's discretion in imposing the death penalty limited to "minimiz[e] the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988). The Supreme Court has held that the statutory aggravating circumstances, such as those in I.C. § 19-2515, must be given a limiting construction if the state is to meet its constitutional obligation "to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed.2d 389, 406 (1980).

Idaho Code § 19-2515(g) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.
>
> . . . .
>
> (5) The murder was *especially heinous, atrocious or cruel, manifesting exceptional depravity.*
>
> (6) By the murder or circumstances surrounding its commission, the defendant *exhibited utter disregard for human life.*

(Emphasis added.) In regard to the (g)(5) aggravating circumstance, the majority concludes that the following limiting construction passes constitutional muster:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter

> indifference to, or even enjoyment of, the suffering of others. *What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*

Slip Op. at 38 (quoting *State v. Osborn*, 102 Idaho 405, 418, 631 P.2d 187, 200 (1981) (emphasis in original).[11]

The limiting construction given to the (g)(5) aggravating circumstance by *Osborn* and reaffirmed today by the majority, is wholly insufficient to guide the sentencer's discretion in limiting the application of the death penalty consistent with constitutional mandates. Terms beget terms. What is the *"norm"* of capital felonies? Who sets this "norm"? Indeed, *all* first degree murders involved the unlawful killing of another with malice aforethought. What sets this particular murder apart – not from other crimes – but from the "norm" of *first degree murder*? In a domestic dispute husband kills wife with a gun. Do all such murders now warrant execution? If so, it can hardly be said discretion is limited.[12]

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[11] The *Osborn* majority adopted this limiting construction to a very similar aggravating circumstance of the Florida Supreme Court in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. den.*, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed.2d 295 (1974).

[12] The *Adamson* court, reviewing Arizona cases applying similar "heinous and/or depraved" language *convincingly demonstrated* that the words themselves are empty vessels capable of being filled by a court as it chooses with *any facts* at hand. *Adamson*, Slip Op. at 15676, ___ F.2d at ___.

Also, the *Osborn* "limiting" definition of the (g)(5) circumstance provides that the murder must be "unnecessarily *torturous* to the victim." Clearly, however, this definition is simply duplicative of the (g)(7) circumstance which subjects defendants to death for murder by torture.[13] In the final analysis, *all* first degree murders are "especially heinous, atrocious or cruel, manifesting exceptional depravity." Nothing in the majority's interpretation restricts the broad brush with which the subsection is drawn.

The (g)(6) aggravating circumstance, which requires that the defendant exhibit "utter disregard for human life," suffers from similar infirmities. Today the majority reaffirms the "limiting" construction enunciated in *Osborn*:

> We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the *utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.*

Slip Op. at 39 (emphasis added) (quoting *Osborn*, 102 Idaho at 419, 631 P.2d at 201). What first degree murderer fails to show "callous disregard for human life"? I suppose this would be the "pitiful" slayer, who, prior to delivering the fatal blow, tells the victim: "Excuse me,

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[13] Idaho Code § 19-2515(g)(7) provides: "The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b)(c)(d)(e), or (f), and it was accompanied with the specific intent to cause the death of a human being." Idaho Code § 18-4003(a) is the murder by torture statute.

pardon me, I know it's inconvenient, but I must now take your life."

Furthermore, the (g)(5) and (6) aggravating circumstances are duplicative. *Every* murderer who exhibits "utter disregard for human life" commits a crime which is "especially heinous, atrocious or cruel manifesting exceptional depravity." Today, however, the majority in *State v. Fain* (1989 Opinion No. ___), concludes that the aggravating factors describe two "quite *different* kinds of culpability." The majority states:

> The particularly cold-blooded killer *need not* act sadistically or in a particularly *outrageous fashion* in order to commit a killing with *utter disregard for human life*. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.

Fain, Slip Op. at 32 (emphasis added).

Thus, according to the majority, a "cold-blooded killer *need not*" act in an "outrageous fashion" to commit a murder "with utter disregard for human life." I cannot fathom a first degree murder which is not carried out in an "outrageous fashion". Every premeditated murder is outrageous.

The (g)(5) and (6) subsections are nothing more than kitchen sink aggravating circumstances which enable the state to make *every* first degree murderer not just a candidate for, but an actual recipient of, the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAIMI D. CHARBONEAU, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING NO. 16339/16741 Reh. No. 89RH-1

The Respondent having filed a PETITION FOR REHEARING on April 25, 1989 and supporting BRIEF on May 16, 1989 of the Court's Opinion released April 4, 1989; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 25th day of May, 1989.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Phillip M. Becker

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this
Court 7-17-89

FREDERICK C. LYON Clerk

By: /s/ Lois Dawson Deputy